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POWER OF A COURT TO PUNISH AS FOR CONTEMPT THE PUBLICATION OF A CRITICISM OF THE COURT AND ITS DECISION IN A CASE AFTER ITS DISPOSAL.

Great indignation has been aroused in the state of Missouri over the action of the supreme court of that state in citing two editors to appear and show cause why they should not be punished for contempt in publishing certain severe strictures upon the court in its decision of a certain case while the same was still pending on a motion for a rehearing. One of the editors thus cited was J. M. Shepherd, of the Warrensburg Standard-Herald. In a recent editorial Mr. Shepherd took occasion, in commenting on the recent decision of the supreme court in the case of Oglesby v. Missouri Pacific Railroad, to charge that the court was biased in its views in favor of the defendant and had come under the influence of that great corporation. The Oglesby case has been in court for over ten years. Oglesby was a brakeman employed by the railroad company, who was severely injured in a wreck which occurred ten years ago. In his suit against the company, Oglesby recovered a judgment for $15,000. On appeal the judgment was sustained. The court granted a rehearing on request of the defendant and again affirmed the decision of the trial court. A second and third rehearing were granted with the same result. On the fourth rehearing, the court decided in favor of the defendant and reversed and remanded the case. On a second trial, the plaintiff again recovered a judgment of $15,000. On appeal the supreme court reversed the decision. It was a criticism of this last decision concerning which a contempt was charged. It also appeared that unknown to the editors so charged, plaintiff had made a motion for a rehearing which was still pending at the time of the publication of the article alleged to constitute cotempt.

On a hearing of the proceeding for contempt the defendant alleged that the article in question was not issued or circulated in the presence or hearing of the court, and was not intended to interfere, nor did it interfere with any of the business of said court or any of its offices; that nothing in said article referred to in said information tends to, and does affect, the said court so as to obstruct or interfere with or impede the administration of justice by said court; that at the time said article was published respondent believed the cause therein referred to had been finally disposed of by this court, and if said cause was still pending in this court he had no knowledge of that fact. Attorney-General Crow appeared for the state. The arguments on the points involved occupied the better part of two hours, and the case was submitted, when the court took a recess to 3 o'clock in the afternoon. The court resumed the bench, and Chief Justice Robinson announced that the court had selected Judge Marshall to write the opinion, which would be handed down later in typewritten form, and that Judge Marshall was ready then to announce the points in the opinion and the judgment.

Judge Marshall then announced the judgment and the points involved orally. The opinion holds principally that the court has power to punish for contempt whenever committed, either direct or constructive, and that the court can punish whether the case is yet pending in court on a motion for rehearing, or at any time thereafter if it so chooses. The court imposed a fine of five hundred dollars and costs. In dismissing the case the court said: "At a later time, so that all persons may have warning, an opinion will be prepared along these lines." The court's opinion will be awaited with much interest.

It is well settled that the publication of an article in a newspaper reflecting on the general course of justice is not a contempt unless it reflects upon the conduct of the court in reference to a pending suit or proceeding, and tends in some manner to influence its decision therein, or to impede, interrupt, or embarrass the proceedings of the court in reference thereto. State v. Kaiser, 20 Oreg. 50, 23 Pac. Rep. 964, 8 L. R. A. 584. The case just cited clearly shows the incorrectness, not of the court's decision in the principal case, but of its *obiter dictum* that a court can punish for contempt the author of a criticism of its decision in a particular case whether such case is yet pending, "or at any time thereafter if it so chooses." That is not the law. The court in the case of State v. Kaiser, says: "The inherent power of a

court of justice to punish for contempt one who commits acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained from the adjudication had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish anyone for criticising the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, however unjust, rude or boorish may be the criticism, or whatever may be its effect in bringing the administration of the law in disrepute." Other cases sustaining this view of the law might be cited as follows: *In re* Thannon, 11 Mont. 67, 27 Pac. Rep. 352; State v. Anderson, 40 Iowa, 207; Neel v. State, 9 Ark. 259, 50 Am. Dec. 209.

Undoubtedly, however, the Supreme Court of Missouri is correct in its ruling that a case, although decided, in which a motion for a rehearing has been made, is still pending, and that therefore the publication of any article reflecting upon the court's decision, or calculated to embarrass the court in its consideration of the motion for a rehearing, is a contempt of court. This particular point was so decided in the comparatively recent case of *In re* Chadwick, 109 Mich. 588, 67 N. W. Rep. 1071. In this case the court held that in a proceeding for contempt for writing a letter criticising the action of the court in rendering a certain decree, it was no defense that the case was not actually pending when the letter was written, the decree being still open to modification, *rehearing*, or appeal. So also to same effect, Fishback v. State, 131 Ind. 304.

In the case of *In re* Chadwick, *supra*, however, the court goes further, *in a dictum*, and tramples upon the principle which we announced in a preceding paragraph. The court said: "Aside from the above consideration (the fact that the case was still pending), the statute does not limit the power to punish for contempt to cases pending in court. Under respondent's contention, a party may threaten to do an act, or charge corruption upon the judge, or that he has submitted to private interviews with the litigants, and, if the case is then pending, he will be subject to summary punishment by the court; but, if the decree has been pronounced, or judgment rendered, or order made, he may, the next moment, with impunity, do the same acts or utter the same statements, and leave the judge to the sole remedy of an action for libel or slander. This is too narrow a construction of the law of contempt, and is not sustained by the best considered cases." As we have shown in a preceding paragraph, this is not the law. Indeed, it is an unprecedented and revolutionary extension of the court's jurisdiction. The individual members of the court should have no greater rights in cases of libel than the governor or other officers of the state government in matters of libel. No halo of immunity from public criticism should surround the heads of the state's judiciary while other servants of the people, equally as honorable, must stand forth in the broad light of day open to attacks of adverse criticism and searching investigation on the part of the press and the people. The judiciary are but men, and therefore are as open to corrupting influences as those in control of any other of the co-ordinate branches of government, and like them, need the deterring influence of free public criticism. Like them, also, they should have their individual actions for libel. Certainly, no greater right to shut off adverse criticism can be given to them without throwing wide open the door to the corruption of the judiciary. The argument that it is the court and not the members thereof that has been libeled is purely metaphysical and does not rest on the facts. Every contempt of this kind that is ever committed is not against the court as a court, but against the court as then constituted; in other words, against the particular members of the court. No one but an avowed anarchist would denounce the court as an institution. A good judge will make the court highly respected, while a Jeffreys will bring it into contempt, but in both cases, in reality, it is the judge himself who is either respected or held in contempt. Any criticism not in regard to a case pending, therefore, alleged to constitute a contempt, must, in nearly every instance, constitute merely a libel on the judge or judges composing the court, for which, like other citizens, they should have their right of action, but no greater rights.

NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE—ASKING IRRELEVANT AND IMPROPER QUESTIONS MERELY FOR THEIR EFFECT UPON THE JURY.—Many shrewd lawyers often engage in a very unprofessional practice for the purpose of impressing the jury favorably towards their client. There is always some evidence in every case bearing indirectly upon the issues, and strongly calculated to impress a jury's feelings, which an attorney often finds is barred out under the rules of evidence. In order to get the effect of these facts before the jury, the attorney will ask prominent, leading questions in endeavoring to elicit this evidence, although, on objection, the questions are ruled out and the witness directed not to answer. These questions suggested at a time when the suspicions or sympathy of the jury have been aroused, or at any other opportune moment, have a decided effect. In the recent case of Cosselmon v. Dunfee, 172 N. Y. 507, the court took occasion to comment upon this practice. The court said:

"We affirm this judgment without opinion, but feel constrained to refer to an occurrence on the trial that has become too frequent in negligence cases. Counsel for plaintiff asked a witness for defendants this question: 'Do you know whether they carry insurance for accident to their employees?' This question was objected to as incompetent, and objection sustained. While the learned trial judge made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey an improper impression to the jury. The inquiry into the matter of insurance is not material, and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and, where the trial court or appellate division is satisfied that the verdict of the jury has been influenced thereby, it should, for that reason, set aside the verdict."

NEGLIGENCE — INSANITY RESULTING FROM RAILROAD ACCIDENT AS THE PROXIMATE CAUSE OF SUICIDE. — A most unusual and interesting question arose in the recent case of Daniels v. New York, etc., Railroad Co., 67 N. E. Rep. 424. The question here was as to whether death by suicide proximately resulted from a railroad accident where it is proven that insanity immediately followed as a result of the accident, and the act of suicide as a result of insanity. The Supreme Court of Massachusetts held that the voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and physical effect of his act, is a new cause, so that his death is not by reason of the negligence of the railroad company, within Pub. St. 1882, ch. 112, § 213, in such case giving a right of action therefor.

The court in its argument calls attention to the conflict of decisions on the similar question arising under policies of life insurance which except from the terms of the contract cases of death by suicide or by the hand of the assured. All cases are agreed that death self-caused in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act would not be death by suicide within the meaning of such a provision in a policy. The authorities divide in cases where death is the result of conscious volition even though the suicide is so far insane as not to be responsible for his conduct. Some authorities hold this to be voluntary suicide. Cooper v. Insurance Co., 102 Mass. 227. In other cases the usual tests of insanity are applied, so that if a suicide is so far insane as to be morally irresponsible, his act of self-destruction is not suicide with the usual provisions of an insurance policy. Breasted v. Trust Co., 8 N. Y. 299, 59 Am. Dec. 482; Manhattan, etc., Insurance Co. v. Broughton, 109 U. S. 121.

But the principal case involves a little different question from that just discussed. The court said: "The question here is whether the volition—the willful, deliberate purpose to take his life, when put in execution— is to be treated as an independent, direct, and proximate cause of the death, notwithstanding that he was so far insane as to be unable fully to comprehend the moral quality of his act. In a condition such as is here supposed, the injury has caused mental disease which has weakened the forces that hold one in check and restrain him from acts of violence, and that enable him to appreciate the reasons for not interfering with the natural laws of his being. Very likely the disease also causes him extreme suffering, and deprives him of the pleasures of life, and thus exposes him to great temptation, from which he would be free if in good health. In this weakened and wretched condition, lacking a sound mind to guide him morally, but still having powers which enable him to know what he thinks he wants to do and how to do it, by an act of volition he chooses to die, and thereupon takes his own life. It may be said that he is forced to the deed by his disordered faculties. Some contend that we are all slaves of destiny. Our subject brings us near to the vexed theological problem as to free will and predestination. Without attempting to pursue these inquiries too far, we are of opinion that the voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death. Suppose, under such conditions, one of an aggressive and irritable disposition should take the life of another person, when, if his mind had not been weakened by the disease, he would have held himself in control; would it be said that the life of the other was lost by the collision on the railroad? Insanity is often a permanent condition of mind, lasting many years, and it calls for care, and often for restraint, of the insane person.

Would suicide or the homicide of another person, resulting from such conditions, after the expiration of many years, be held to be caused by the collision, within the meaning of this statute, if the insanity was the effect of a collision?

We are of opinion that the principal reasons which induced the decisions in the first class of cases under insurance policies, to which we have referred, are still stronger to compel a decision that a defendant is not liable under this statute for a death such as we have supposed. Indeed, the Supreme Court of the United States, which holds that an insane person who takes his own life does not die by his own hand, within the meaning of the words in the insurance policies, has decided unanimously in Scheffer v. Railroad Company, 105 U. S. 249, 26 L. Ed. 1070, that the representative of a person who was injured in a railroad accident, and took his own life while insane, about eight months afterwards, could not recover under a statute like that now before us by showing that his insanity was caused by the accident. We are satisfied with the conclusions reached in Dean v. American Insurance Company and Cooper v. Massachusetts Mutual Life Insurance Company, *ubi supra;* and under this statute, involving different but similar considerations, we are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. We are of opinion that the term "rational volition," used in the charge, was understood by the jury to mean volition attended by the powers of reason, to consider and judge of the act in all its relations — moral as well as physical — and that the charge was in this respect too favorable to the plaintiff."

ASSOCIATIONS—LIABILITY OF MEMBERS OF AN UNINCORPORATED SOCIETY TO INDEMNIFY TRUSTEES OF THE SOCIETY AGAINST LOSS SUSTAINED.—An interesting point has been decided by the judical committee in Wise v. Pepetual Trustee Co. (1903, A. C. 139) with reference to the position of trustees who incur liability for a club; in the words of Lord Lindley, who delivered the judgment of the committee, "the extremely important question whether the members of an ordinary club are personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees, and where there is no rule imposing liability."

In 1886 certain persons, including Mr. Paling, since deceased, formed a club at Sydney called the Cercle Francais. Mr. Wise became a member of the club in 1886 and so remained until its dissolution. Under rules adopted in July, 1887, the administration of the affairs of the club was intrusted to a committee elected at the first general meeting in each year. The committee was to dispose of the funds of the club, and had full power to take all measures for the internal management which it might deem necessary. The duties of the members of the committee were purely honorary. Towards the end of 1887 steps were taken to provide increased accommodation, and at a meeting held in December, at which, however, there were not sufficient members present to bind the club, the subject of obtaining new premises was discussed, and it was resolved that the matter should be left in the hands of the president of the club to make such arrangements as he thought best, and the president and three others, including Mr. Paling, were appointed trustees of the club. A general meeting was held in January, 1888, at which the minutes of the December meeting were read and confirmed. In July of the same year the trustees became lessees of certain premises for a term of ten years at a rent of £555 a year. The premises were thereupon used for the purposes of the club, and so continued to be used until the club was dissolved. In the same month a new set of rules was adopted, under which the property of the club, subject to the liabilities thereof, was declared to belong to the members for the time being, who, however, were to have no transmissible interest therein. All purchases, leases, etc., were to be made and taken in the names of the trustees, in whom all property of the club was to be vested upon trust for the members. Personal property was to be disposed of at the direction of the committee, but the real property of the club was not to be dealt with except by resolution of a general meeting. The rules prescribed the entrance fee and subscriptions, but they did not expressly impose upon the members liability to make any further payments. The club was dissolved in 1891, and for some years subsequently the trustees sub-let the club premises, but ultimately the liabilities under the lease devolved upon Mr. Paling as the only trustee able to meet them, and he in his lifetime, and after his death his executors, the Perpetual Trustee Co., paid under the lessees' covenants some £2,350 in excess of the rents received by sub-letting. In 1897 the Perpetual Trustee Co. commenced proceedings against former representative members of the club to obtain a declaration of their right to indemnity, and an order was made declaring that all members in July, 1888, who assented to or subsequently ratified the lease taken in that month were bound to indemnify the late Mr. Paling and his estate against the rent and other moneys paid under the lease. Subsequently Mr. Wise was included in the list of members liable under the order, and he appealed, but unsuccessfully. Thereupon he appealed to the judicial committee, with the result that Mr. Paling's executors are declared to have no reme-

dy against the former members of the club personally, but only a lien on the club property for the expenses which his estate has incurred.

The question of the liability of *cestui que trusts* to indemnify their trustees was considered two years ago by the same tribunal in Hardoon v. Belilois (49 W. R. 209; 1901, A. C. 118). In that case shares in a bank subject to a liability for uncalled capital had been placed by A, the beneficial owner, in the name of a trustee. A raised money on them, and ultimately the absolute beneficial interest vested in B, the lender. At first B provided the trustee with money to meet calls on the shares, and he received the dividends; but at length he refused to find further funds, and the trustee, who had become liable for £400, sought to recover this amount from him. The defense was that B had not created the trust, and that hence he was under no contractual liability to indemnify the trustee, who must look for reimbursement solely to the trust property. But the privy council, in a judgment delivered by Lord Lindley, held that in a case where the *cestui que trust* was *sui juris* and absolute beneficial owner, the remedies of the trustee were not thus limited. "All that is necessary," said his lordship, "to establish the relation of trustee and *cestui que trust* is to prove that the legal title was in the plaintiff and the equitable title in the defendant." And, this relation being established, there followed the result that an absolute beneficial owner was liable to bear the burdens of ownership. "The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can show some good reason why the trustee should bear them himself. * * * Where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust peoperty; it extends further, and imposes on the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee." This principle was applied under the circumstances of Hardoon v. Belilois, and hence the trustee succeeded in his claim. But it was admited that the result would be different where the beneficial ownership was not vested solely in a person *sui juris;* if, for instance, the shares had been held by the plaintiff on trust for tenants for life, or for infants. "In those cases," said Lord Lindley, "there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances, and in the absence of special contract, his right to indemnity cannot extend beyond the trust estate—that is, beyond the respective interests of his *cestui que trusts.*"

The Solicitor's Journal in speaking of this case, says: "In Wise v. Perpetual Trustee Co. the question was really whether the members of the club were to be treated as absolute owners, so as to fall within the principle acted on in Hardoon v. Belilois, *supra*, and to incur personal liability to the club trustees, whether they were not rather to be treated as being in the position of partial owners, so that the rights of the trustees were limited to their lien on the trust property. The latter view was adopted by the judicial committee, it being pointed out that members join a club upon the footing that they are to be liable only for the usual payments. 'Clubs,' said Lord Lindley, who delivered the judgment in the present case as well, 'are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them fromother societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he continues a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed.' This is in accordance with the principle recognized in *Re* St. James's Club (2 D. M. & G. 383), that no member of a club is liable to a creditor except so far as he has assented to the contract in respect of which his liability has arisen, and if a claim is based on this concurrence, the facts must be specifically proved. In the present case the judicial committee held, with regard to Mr. Wise's alleged assent or ratification, that though he knew that the lease had been taken for the club and that the club had the use of the property, and that the lease might become a burden to the club, yet he had done nothing to incur any liability to indemnify the trustees unless such liability attached to him as a member of the club and as one of the *cestui que trusts* of the lessees. But as already stated, there was, in respect of this relation, no personal liability. The result brings home to trustees for clubs the liability which they incur, a liability against which they should protect themselves, where expedient, by obtaining specific guarantees."

In this country the cases on this exact question are not numerous. It is well settled, however, that in winding up the affairs of an association or club all members are liable for contribution to equalize the losses among the members of the association. Wilcox v. Arnold, 162 Mass. 577; Cheney v. Goodwin, 88 Me. 563, 34 Atl. Rep. 420. The statement of Lord Lindley in the case to which we have just directed attention, that "no member of a club as such becomes liable to pay to the funds of the society or any one else any money beyond the subscription required by the rules of the club" is not the law in this country. They are liable, at least, to idemnify their officers or trustees whom they have by express vote authorized to incur any liability in the name of the association. Ferris v. Thaw, 5 Mo. App. 279, 72 Mo. 446; Ray v. Powers, 134 Mass. 22. In the last case cited a voluntary association was formed

for the encouragement of pigeon-breeding. A public exhibition was held, which, although not specially authorized by the constitution or by-laws of the association was not inconsistent with its objects. The court held that members who participated in a vote authorizing expenses to be incurred for the purpose of the exhibition, or who assented to be bound by such vote, might be charged, in equity with their share of such expenses, at the suit of the members or officers who had paid them. The law in regard to that phase of the question relating to the liability of the *cestui que trust* to reimburse his trustee for expenditures made in his behalf, is the same in this country as in England. The rule is well settled that such liability exists. Perry on Trusts (5th Ed.), Sec. 910. In this last citation the learned author says: "Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty."

TAXATION OF TELEPHONE AND TELEGRAPH COMPANIES.

Taxation, as an essential of government, is one of the principal attributes of sovereignty and as such, the taxing power is coincident with the power to ruin. So corporations engaged in the electrical transmission of messages fall naturally under such constitutional and legislative provisions of taxation as apply generally, and in addition are liable to certain further uniform taxation to which the individual, as a rule, is not subjected. A consideration of the various authorities presents many interesting questions and it cannot yet be said that the matters involved have reached such uniformity as would permit of the formulation of rules alike applicable in every particular case. The primary question to arise was that concerning interstate commerce,[1] and discussing this phase of the matter, the court in Railway Co. v. Illinois,[2] said: "This court holds now and has never consciously held otherwise, that a statute of the state intended to regulate, or tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one state to another is not within that class of legislation which the states may enact in the absence of legislation by congress." In conformity with this decision, such taxation even as to that part of a message between states, wholly within the boundaries of the state levying the tax, is void.[3] Later construing state taxation of telegraph and telephone companies, in the light of the "Telegraph Act,"[4] the court said: "It could never have been intended by the congress of the United States in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary for its support. * * * While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or to stop the use of them after they were placed there, nevertheless the company receiving the benefits of the laws of the state for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be."[5] So any exemption of telephone or telegraph companies from taxation by the state, depends entirely upon the question as to whether the state in so taxing them thereby deprives them of the power to efficiently and properly pursue their business as federal agencies engaged in commerce between the states. A tax upon their property situate within the state cannot, it is held, have such an effect.[6] So a state may tax the property, lying within its boundaries, of a telegraph company but a direct tax upon its franchise, derived from other source than the power levying the tax, is unconstitutional and void as an interference with commerce between the states;[7] and, although an interstate telegraph line is taxable as property by a state through which it runs, the operation of the line cannot be enjoined for non-pay-

[1] Art. 1, Sec. 8, U. S. Const.
[2] 118 U. S. 557.
[3] LeLoup v. Port of Mobile, 127 U. S. 640; W. U. Tel. Co. v. Alabama, 132 U. S. 472; W. U. Tel. Co. v. Charleston, 163 U. S. 711.
[4] Act of Congress July 24, 1866, ch. 230.
[5] Tel. Co. v. Massachusetts, 125 U. S. 530, 548.
[6] R. R. Co. v. Penniston, 58 Wall. 5. See, also, opinion Field, J., in 114 U. S. 196.
[7] San Francisco v. W. U. Tel. Co., 96 Cal. 140, 31 Pac. Rep. 10; Atty.-Gen. v. W. U. Tel. Co., 141 U. S. 40; W. U. Tel. Co. v. Norman, 77 Fed. Rep. 13.

ment of the tax;[8] nor can a state impose a license tax upon a foreign telegraph company, engaged within its boundaries in interstate commerce.[9] In short the most careful distinction must be made. Where the effect of the tax is a matter of purely local interest and affects interstate commerce only incidentally, then such taxation is a valid exercise of the sovereign power of the state; but, on the other hand, congressional power is exclusive when the matter is national in character, and so long as congress passes no law, under its power to regulate and control matters of interstate commerce, it is to be presumed that the intention is that such matters shall be free from any state legislation that might prevent, or materially impede the operation of such agencies as may be engaged in business of this nature.[10] Yet when a corporation does business in a state other than the one creating it, it is properly subject to certain forms of taxation that are to be regarded as local in their nature. So it has been held that a tax upon the gross receipts of a telegraph company, within the state, even though these be partly derived from messages over lines only in part within the state is not in conflict with the interstate commerce act;[11] but this rule seems altogether too broad and sweeping in its scope; it would appear better law if subjected to slight modification. If such receipts are capable of separation and apportionment, and there seems little doubt that such is the case, then a tax of this nature is invalid as to the receipts derived from interstate commerce and valid as to the receipts derived from business wholly within the taxing state.[12] So too, a specific tax upon each message is valid as to those messages from place to place exclusively within the jurisdiction of the state but invalid and unconstitutional as to those transmitted beyond the state.[13]

Recent legislation has presented for legal consideration a somewhat novel form of taxation, a direct tax upon corporate franchises. This, in the natural trend of events, falls heavily upon such corporations as may be embraced under the head of "Public Utilities." With the questions of policy, difficulty of calculation, or that of the iniquity of this form of taxation, we cannot, within the scope of a discussion purely legal, properly concern ourselves. There can be no doubt of the power of the state to tax foreign corporations for the privilege of exercising their franchises and rights within the jurisdiction of the state and while it may not impose conditions repugnant to the constitution of the United States, nor interfere with matters properly under congressional control, the state may even exclude such corporations entirely from doing business within its jurisdiction.[14] In distinguishing between a tax upon property and one affecting a franchise, the rule as laid down by Clopton, J., may be quoted: "The usual and most certain test," says the learned judge, is "whether the tax is upon the capital stock *eo nomine* without regard to its value, or at its assessed valuation in whatever it may be invested; if the former it is a franchise tax; if the latter a tax upon property."[15] So a state tax upon the gross receipts of a corporation has been held to be a franchise tax.[16]

In a consideration of this matter it may be laid down as a general rule that a state may levy a franchise tax upon corporations of its own creation without regard to the nature of their business, even though they be engaged in foreign or interstate commerce.[17] So it may be said that for the purposes of taxation, franchises are property.[18] But to warrant the imposition of a tax upon corporate franchises, the taxing statutes must include them among the subjects of taxation, otherwise a tax thereon is void;[19] so a municipal

[8] W. U. Tel. Co. v. Massachusetts, 125 U. S. 530; *In re* Pa. Tel. Co. (N. J.), 20 Atl. Rep. 846.

[9] Com. v. Smith, 92 Ky. 38; W. U. Tel. Co. v. Ala. St. Board, 132 U. S. 472.

[10] Brown v. Houston, 114 U. S. 622; Walling v. Michigan, 116 U. S. 446; W. U. Tel. Co. v. Atl. Co., 5 Nev. 103.

[11] St. Clair v. Cox, 106 U. S. 350; W. U. Tel. Co. v. Com. (Pa.), 20 Atl. Rep. 720.

[12] Ratterman v. W. U. Tel. Co., 127 U. S. 411.

[13] Tel. Co. v. Texas, 105 U. S. 460; Postal Tel. Co. v. Charleston, 153 U. S. 692; W. U. Tel. Co. v. Comr., 110 Pa. 405.

[14] W. U. Tel. Co. v. Lieb, 76 Ill. 172; State v. W. U. Tel. Co., 73 Me. 518; W. U. Tel. Co. v. Mayer, 28 Ohio St. 521.

[15] State v. Ins. Co., 89 Ala. 335, 338.

[16] State v. R. R. Co., 45 Ind. 361; Power & Light Co. v. State, 79 Md. 63.

[17] Postal Tel. Co. v. Campbell, 70 Hun (N. Y.), 507; United Lines Tel. Co. v. Campbell, 53 N. Y. S. Rep. 793; Bridge v. Henderson, 141 U. S. 679.

[18] Fietsam v. Hay, 122 Ill. 293; Assessors v. Cent. R. R., 48 N. J. L. 146; Gas Co. v. Deehan, 153 N. Y. 528.

[19] Bridge Co. v. Dist., 5 Mackey, 376.

tax on a franchise is *ultra vires.*[20] Under a general statute requiring the taxation of all real and personal property, it seems the better opinion that a corporate franchise cannot be taxed.[21] But there are weighty decisions to the contrary of which note must be made. An *ad valorem* tax upon the franchise of a public utility corporation is held, in Kentucky, to be required by the constitutional provision providing that all property, whether owned by persons or corporations, shall be taxed in proportion to its value.[22] So, it is held, that such a franchise is subject to taxation under a general law requiring the taxation of all real and personal property, although there is no special provision for ascertaining the value of the franchise.[23] The general rules governing the taxation of telephones and telegraphs are those applicable to the property of other corporations or individuals. Still in many jurisdictions further local taxation has been ordained and the statutes of each particular state, wherein questions of this nature arise, must be carefully considered. Such for example is the case in Illinois and in Virginia, where telephone and telegraph companies are made subject to state, county, township (or district) municipal and school taxes; as well as, in Virginia, to a specific license tax.[24]

As to questions of municipal taxation, the initial inquiry concerns itself with the extent of the delegation of power to the particular city under consideration, under authority of the constitution or by legislative act, expressed or following by necessary implication. So it has been held that where a city contracts for a sum to be paid by a telephone company for the use of its streets, it is not a tax and its name is immaterial as long as it is within the power of the municipality to enter into such a contract;[25] but where a city charter empowers it to license, regulate or prohibit telegraph or telephone companies using its streets or alleys and fix the compensation to be paid annually for such privilege or license, an ordinance for revenue is *ultra vires*, but a tax to cover the expense of regulation and policing is a valid exercise of municipal power.[26] A tax of this nature may be termed, generally speaking, a license or occupation tax and it may be laid down as a general rule that if such a tax be for the purpose of municipal gain, for which no specific statutory or constitutional authority exists, it is *ultra vires* and void as an abuse of municipal police power. It has been held that an ordinance providing that a telephone company shall not occupy the streets of a city without paying an annual license fee of $100, is a revenue provision and not authorized by a charter providing that the council may license such a company and fix the annual compensation therefor.[27] But a reasonable charge, against a telegraph company, in the nature of a rental for the exclusive use of a part of the streets for the erection of poles and wires is a proper exercise of police power.[28] So a city may impose a license tax upon the poles and wires of such a company to cover the expense to which it is put in the enforcement of its police regulations by reason of the existence of such lines upon the streets of the municipality, even though the company be a foreign corporation and engaged in interstate commerce, since the company enjoys the benefits and protection of such police regulations, and must necessarily bear the burdens incident thereto.[29]

As to whether a municipal tax upon the poles and wires of telegraph or telephone companies is, or is not, reasonable, local conditions must be taken into consideration; as for example, the value of the surrounding property,[30] and the cost of issuing licenses or maintaining police regulations,[31] no rule governing such estimates can be laid down. The reasonableness of such an impost may be the subject of judicial inquiry, and as such, is a question of fact for the jury when it arises in

[20] Gas Co. v. Covington, 92 Ky. 312. But in Kentucky (Act 1890) franchises are now subject to taxation for state purposes, and (Stock Yard Co. v. Clark, 13 Ky. L. Rep. 926) to local taxation by counties, cities and towns. So. Ry. Co. v. Coulter, 68 S. W. Rep. 873.

[21] Water Co. v. Paterson, 56 N. J. L. 471. *Contra:* Water Co. v. Fond du Lac, 82 Wis. 322.

[22] St. Ry. Co. v. Bellevue, 57 L. R. A. 50.

[23] Light & Power Co. v. Judson, 57 L. R. A. 78.

[24] Ch. 499, Laws 1899, 1900; Supp. Va. Code, ch. 36, sec. 833 as amended Laws 1895-6, p. 274.

[25] Plattsburg v. People's Tel. Co., 86 Mo. App. 306.

[26] Sunset Tel. & Tel. Co. v. Metford, 115 Fed. Rep. 202.

[27] Sunset Tel. & Tel. Co. v. Metford, *supra.*

[28] St. Louis v. W. U. Tel. Co., 149 U. S. 465.

[29] Philadelphia v. W. U. Tel. Co., 32 C. C. A. 246; Tel. Co.v. City, 22 W. W. C. (Pa.) 39; Allentown v W. U. Tel. Co., 148 Pa. St. 177; Chester v. Phila. R. & P. Tel. Co., 148 Pa. St. 120.

[30] St. Louis v. W. U. Tel. Co., 63 Fed. Rep. 68.

[31] Lancaster v. Ed. Ill. Co., 8 C. C. (Pa.) 178.

an action at law. Such tax may be set aside by the court only when the abuse of the power by the municipal authorities is plainly evident.[32] No fixed rule determining the reasonableness of an annual license fee can be enunciated. It has been held that it is not to be measured by the amount actually expended for any one particular year in issuing the license and maintaining the regulation;[33] and what is so reasonable in the one locality may be unreasonable and self-evidently for revenue in another; as for example, a tax of $1.00 per pole and $2.50 per mile of wire has been held a reasonable tax in a Pennsylvania Borough,[34] and the same amounts held unreasonable and void in the city of Philadelphia.[35] In short each particular case must stand by itself and a wide latitude should be allowed in the introduction of evidence. When the matter becomes one of judicial inquiry, every surrounding circumstance that may aid in a determination of the question is to be taken into consideration. It may safely be laid down as a settled rule of law governing such police regulations, that reasonableness ends when the acquisition of revenue begins. Under the general police power, a municipality may recompense itself, by taxation of telephones and telegraphs, for the expense incurred by reason of its police regulations peculiarly applicable to such corporations, but it cannot acquire financial benefit therefrom.

G. C. HAMILTON.

New York.

[32] Phila. v. W. U. Tel. Co., 32 C. C. A. 246.

[33] Borough of Taylor v. Postal Tel. Co., 52 Atl. Rep. 128.

[34] Borough of New Hope v. Postal Tel. Co., 50 Atl. Rep. 127.

[35] Philadelphia v. W. U. Tel. Co., 81 Fed. Rep. 948.

UNFAIR TRADE—DECEPTION OF PUBLIC BY USE OF SIMILAR NAMES.

HOPKINS AMUSEMENT CO. v. FROHMAN.

Supreme Court of Illinois, April 24, 1903.

Plaintiff alleged that he had contracted with the composers of a drama known as "Sherlock Holmes" for the exclusive right to produce the same, and that he had produced it in the principal cities of the United States at large expense; that defendant as manager of a theater, had advertised and threatened to produce a play commonly known as a detective play, under the name of "Sherlock Holmes, Detective;" that in order to secure to itself the fame and benefits of plaintiff's drama and trade-mark, defendant had advertised such play under such name in order to deceive the public, and make such play so advertised, which was greatly inferior to plaintiff's play, appear to be the play owned by plaintiff. Held, that such facts were sufficient to justify an injunction restraining defendant from performing its play under the name of "Sherlock Holmes, Detective," on the ground of deception of the public, without regard to whether plaintiff was entitled to a trade-mark in the name "Sherlock Holmes."

BOGGS, J.: The appellate court for the first district affirmed a decree entered in the circuit court of Cook county, perpetually enjoining the appellant company from advertising, producing, or performing a play entitled "Sherlock Holmes, Detective." The bill of complaint sets forth at length, in substance, that appellee, a resident of New York, is a theatrical manager; that A. Conan Doyle is the author of a book entitled "The Sign of the Four," in which he created a character known as "Sherlock Holmes," a detective; that said Conan Doyle and one William Gillette, a dramatist and actor, collaborated, and composed a drama in four acts, the plots, scenes, incidents, and characters of which were original with said Doyle and Gillette, to which they gave the name of "Sherlock Holmes;" that appellee contracted with said Doyle and Gillette for the exclusive right to produce, perform, and represent said drama for five years from December 7, 1898, in the United States and elsewhere; that he produced the same in the principal cities of the United States at an expense of many thousands of dollars; that the receipts therefrom have been large; that the name of said play, to-wit, "Sherlock Holmes," is of great value as a trade-mark, and that appellee has expended large sums of money in advertising said play under the trade-mark name of "Sherlock Holmes;" that the appellant company is the lessee and manager of Hopkins Theater, Chicago, and has advertised and threatened to produce a play commonly known as a "detective play," at said Hopkins Theater, under the name "Sherlock Holmes, Detective," and that, "in order to secure to itself the fame and benefits of appellee's said drama and trade-mark and in order to deceive the public, and make the said play so advertised by the defendant, as aforesaid, appear to be the play of your orator, to-wit: the drama of 'Sherlock Holmes,' collaborated by A. Conan Doyle and William Gillette, is wrongfully and fraudulently using your orator's said trade-mark without the consent of your orator; that the play 'Sherlock Holmes, Detective,' which the defendant advertised and threatens to produce, is greatly inferior to the play of your orator, and the said Hopkins Amusement Company, in attempting to produce its play under the trade-mark of your orator, to-wit, 'Sherlock Holmes,' is attempting to deceive the public, as aforesaid, by trading upon the reputation which your orator's said play and trade-mark have attained by reason of the excellence of said play and the large sums of money expended by your orator in advertising and staging his said play."

Appellant filed a general demurrer to the bill, which, on hearing, was overruled. Appellant elected to stand by its demurrer, whereupon the court entered its decree finding "that the allegations of said complainant's bill herein are true," and granting appellee relief as prayed for. The appellant having elected to abide its demurrer, thereby admitting all of the allegations of the bill to be true (Miller v. Davidson, 3 Gilman, 518, 44 Am. Dec. 715), and the court having proceeded at once to a decree, the only inquiry is as to the sufficiency of the allegations of the bill to warrant the decree. Wangelin v. Goe, 50 Ill. 459; Hannas v. Hannas, 110 Ill. 53.

We think the facts disclosed by the allegations of the bill justified a decree perpetually enjoining the appellant company from announcing, advertising, and performing the play under the name of "Sherlock Holmes, Detective." The name given to the drama advertised to be performed by the appellant company and that borne by the play of the appellee are so similar that the likelihood is that the public would be deceived to believe that the drama of the appellant company was that which the appellee had been producing. This likelihood of deception is declared to be the test in Hopkins on Unfair Trade, p. 186, and the same author there remarks that in applying this test all doubts are to be resolved in favor of the complainant. Moreover, in the case at bar it is expressly averred in the bill that the appellant company adopted the name given to its play "in order to secure to itself the fame and benefit of your orator's meritorious and well-known drama and said trade-mark, and in order to deceive the public and make the said play so advertised by the defendant, as aforesaid, appear to be the play of your orator, to-wit, the drama 'Sherlock Holmes,' collaborated by A. Conan Doyle and William Gillette." This is an allegation of fact conceded by the demurrer to be true.

The decree is to to be sustained, not upon the theory upon which the bill was framed, that the appellee has an exclusive property right in the name "Sherlock Holmes," as a trade-mark, but upon the ground that it appeared from the allegations of the bill, independently of any of the allegations with reference to the alleged trade-mark rights of appellee, that the appellant company adopted and used the words "Sherlock Holmes, Detective," as the name of the play intended to be produced by it, in a manner calculated to deceive the public, and with intent to lead the public to believe that it would perform the drama which the appellee had made well known and popular, and thereby not only to deceive the public, but injure the appellee. It appeared from the allegations of the bill that the appellant company gave to the drama it intended to produce the title of "Sherlock Holmes, Detective," for the purpose of fraudulently and intentionally deceiving the public and availing itself of the reputation of the drama of the appellee, and thereby unfairly to palm off upon the public a greatly inferior drama or play, to the deception of the public and the injury of the appellee. Equity provides a remedy to prevent such unfair and fraudulent competition among business rivals in any and all lines of legitimate trade and business. Hopkins on Unfair Trade, pp. 25, 32 and many cases cited among the notes, among them Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535. We, however, do not decide or concede that the appellee has a trade-mark right or property in the words "Sherlock Holmes."

The decree appealed from being a final decree for an injunction rendered upon facts admitted by the appellant company, and sufficient to authorize the restraining action of the court, it is immaterial now to determine whether the bill was sufficiently verified by an affidavit. 10 Ency. of Pl. & Pr. 966.

The judgment of the appellate court must be and is affirmed. Judgment affirmed.

NOTE. — *Deception of Public by Use of Similar Names as Constituting Unfair Trade.*—The principal case is not decided upon the theory that the appellee has an exclusive property right in the name "Sherlock Holmes" as a trade-mark, but on the ground that the appellant company adopted and used the words "Sherlock Holmes, Detective," as the name of the play intended to be produced, in a manner *calculated to deceive the public* and thereby injure the appellee. Whether or not the appellee has a trade-mark right or property in the words "Sherlock Holmes" is left undecided. The principle upon which these cases are decided is well stated in 3 Pomeroy, Eq. Jur., Sec. 1354, when it is said: "Although some judicial opinions and some recent statutes speak of property in trade-marks, or call the right to their exclusive use a kind of property, yet in strictness the remedy does not depend upon any true property acquired in these symbols and names, but upon the broad principle that a court of equity will not permit a fraud to be practiced upon the public, nor upon private individuals. It is well settled by modern decision, that where a trade-mark has been duly acquired by a manufacturer or dealer, an injunction will be granted at his suit to restrain other persons from using it upon their goods, or from imitations of it, as will tend to mislead and deceive the public." 3 Pomeroy, Eq. Jur., Sec. 1354 (citing a large number of cases). The broadest ground of equitable jurisdiction in such cases, is the prevention of fraud. See 1. Spelling, Extraordinary Relief, Secs. 891, 896 and 898. A notable case, because nearly every one is familiar with Gruber's Hagerstown Almanac, is that of Robertson v. Berry, 50 Md. 591. In the opinon it is said: "This appeal is from an order granting an injunction, restraining the appellant from publishing and circulating a certain almanac for the year 1879, known as T. G. Robertson's Hagerstown Almanac, with the same emblems, devices, marks, representations, title, and back, outside pages, style, shape and general appearance, as have characterized the publication of the same for previous years, and from printing, publishing and circulating any other almanac in colorable imitation of the almanac of the complainants, known as J. Gruber's Hagerstown and Country Almanac, and calculated to deceive

and impose upon the public and to create in their minds the belief that such almanac is really and truly the almanac of the complainant. * * * The order appealed from will be affirmed." Robertson v. Berry, 50 Md. 591. A number of examples are given in 26 Am. & Eng. Ency. of Law, 505. See, also, 10 Amer. & Eng. Ency. of Law, 932.

The William Roger's Manufacturing Co. engaged in the manufacturing of silver ware, secured an injunction against the use of the name of "The Wm. G. Rogers Company." International Silver Co. v. Wm. C. Rogers Co., 113 Fed. Rep. 529. The word "Swift" adopted and long used by Swift & Company, will be protected by injunction against another from using the name for like products. Swift Co. v. Groff, 114 Fed. Rep. 605. "Carmencita" as applied to cigars is not infringed by "La Camerita," where one is a five cent cigar and the other a ten cent. Brown Bros. v. Bucher & Bucher, 6 Ohio N. P. 379. "Every Day Soap" is infringed by "Everybody's Soap." Proctor & Gamble v. Globe Refining Co., 92 Fed. Rep. 357. Where the packages are similar, etc., "Uneeda" has been held to be infringed by the use of "Iwanta." National Biscuit Company v. Baker, 95 Fed. Rep. 135. "International Society" by "The International Society of Literature." International Society v. International Society, 59 N. Y. Supp. 785. "Six Little Taylors" is infringed by "Six Big Taylors." Moslers v. Jacobs, 66 Ill. App. 571. "Perfume Puffs" by "London Whiffs." Feder v. Brudno, 5 Ohio N. P. 275. "Williamson Co." by "Williamson Corset." Corset & Brace Co. v. Corset Co., 70 Mo. App. 424. A book entitled "Farthest North, Nansen" is not infringed by another publication entitled "The Fram Expedition, Nansen in the Frozen World." Lare v. Harper Bros., 86 Fed. Rep. 481. A blue label "Old Country" is not infringed by a red, white and blue label "Our Country." Wrisley Co. v. Rouse Soap Co., 87 Fed. Rep. 589. The words "Cyclops Machine Works" will be protected against the use of the word "Cyclop" in the same business. Hamque v. Cyclops, 136 Cal. 351, 68 Pac. Rep. 1014. "Cuticura" is not infringed by the word "Cuticle," there being nothing else showing a purpose of deception. Potter Drug, etc., v. Pasfield Soap Co., 106 Fed. Rep. 914. One firm will not be granted an injunction against another for using the same colored wrapper, with words omitted. Omega Oil Co. v. Weschler, 71 N. Y. Supp. 983. "Junket Tablets" protected against "Junket Capsules." Hanson v. Siegel-Cooper, 106 Fed. Rep. 691. But "Grape Nuts" is not infringed by "Grain Hearts," provided the name is not so displayed and the package so made as to deceive. Postun Cereal Co. v. Am. Health Food Co., 109 Fed. Rep. 898. "Stell Shod" is not infringed by the words "Stell Clad." Brennan v. Emery, etc., Dry Goods Co., 99 Fed. Rep. 971. Neither is, "Rough on Rats" by "Rough on Skeeters." Well v. Ceyton, 105 Fed. Rep. 621. But, "Roachsault" is by "Warranted Chemical Roachsault." Barrett Chemical Co. v. Stern, 67 N. Y. Supp. 595.

So is "Health Food Company" by "Sanitarium Health Food Company." Fuller v. Hough, 104 Fed. Rep. 141. Also, "Manufacturers Outlet Co." by "Staunton Outlet Co." Samuels v. Spitzer, 177 Mass. 226. "Fairbanks Gold Dust" by "Gold Drop." N. K. Fairbank Co. v. Lurkel, etc., 88 Fed. Rep. 694. "Excelsior Felt Pads" is infringed by the use of "Excellent Felt Pads." Folger v. Force, 71 N. Y. Supp. 209. "Welcome" soap is infringed by "Welcome A. Smith," the word "Welcome" above the "A" Smith is in much larger type, etc. Lever Bros. v. Smith, 112 Fed. Rep. 998. The use of the words "Water from the New Springs at Caladonia" will be enjoined at the instance of one who has expended large sums in advertising and establishing a business under the trade-mark of "Caladonia Mineral Water," "Caladonia Water" and "Caladonia Springs." Grand Hotel Co. v. Wilson, 2 Ont. Law Rep. 322. The name "Cincinnati Vici Shoe Company" is not an infringement on "Cincinnati Shoe Company." Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co., 7 Ohio N. P. 135. "Walnut Grove Dairy" is infringed by "Walnut Park Dairy." Nokes v. Mueller, 72 Ill. App. 431. "Oriole Vermillion" and "Peerless Green" by "O. Vermillion" and "P. Green." Lavenburg v. Pfeiffer, 52 N. Y. Supp. 801. Complainants had long sold Hostetter's Bitters in bottles of peculiar form and size, and established a large business therein. Defendants sold, in demijohns, spurious bitters, closely resembling the real article, labeling them "Hostetter's Bitters," with intent that they should be sold by the drink, at the bar, as Hostetter's Bitters. Held that this was unfair competition, and should be enjoined. Hostetters Co. v. Sommers, 84 Fed. Rep. 53. A fraudulent intent is of the essence of unfair competition. Gorham Mfg. Co. v. Dry Goods Co., 92 Fed. Rep. 774.

"Oakes' What is it" is not infringed by "Hawthorne's What is it." Oakes v. St. Louis Candy Co., 48 S. W. Rep. 467. However, "Stuart's Dyspepsia Tablets" is by "Dr. Stewert's Dyspepsia Tablets." Stuart v. F. G. Stuart Co., 9 Fed. Rep. 243. So is "Elgin" by "Elgin Tiger" and "Elgin Giant." Elgin Watch Co. v. Ill. Watch Co., 89 Fed. Rep. 487. "The Little Antique Shop" by "The Little Shop." Crawford v. Louis, 60 N. Y. Supp. 387. One who offers the goods of one manufacturer under the well known names and established reputations of another manufacturer, for the purpose of deceiving the public, and defrauding the latter, aggravates rather than justifies his wrong, by placing his own name upon the package. Heller & Mertz v. Shaver, 102 Fed. Rep. 882; Shaver v. Heller & Mertz, 108 Fed. Rep. 821. It may be stated as a general principle underlying the law of unfair competition, that nobody has the right to sell his goods as the goods of somebody else. Heller & Mertz v. Shaver, 102 Fed. Rep. 882.

The following appear in former numbers of the CENTRAL LAW JOURNAL: Injunction against proprietors of Booth's Theater of the use of Booth's name, 3 Cent. L. J. 794. Right of manufacturer to label his goods with his own name, if no fraudulent purpose is intended, 5 Cent. L. J. 7. A man and his name, 11 Cent. L. J. 3, 27, 84, 106. Though a mark be so made as not to deceive the trade, yet if there be danger of deception, it may be enjoined, 19 Cent. L. J. 109. "Sweet German Chocolate" enjoined as an infringement of "German Sweet Chocolate," 22 Cent. L. J. 6. Right to use one's own name, 51 Cent. L. J. 2; 49 Cent. L. J. 404. Injunctive restraint on unfair competition in trade, 50 Cent. L. J. 225. Originality of a name as a trade-mark, 48 Cent. L. J. 108. Deception in trade-mark, 48 Cent. L. J. 87 (see cases cited). Injunction to restrain the use of a trade-mark of an adjective describing excellence of a business, 47 Cent. L. J. 381. Illegal trade rivalry, 45 Cent. L. J. 257. A trademan by the adoption of the name "Mechanics Store" may enjoin the use by another of the name of "Mechanical Store," 41 Cent. L. J. 485. How far one using his family name in business, and adopting it in good faith, may be re-

strained from using it by one who has acquired a trade-name therein, 40 Cent. L. J. 252; 32 Cent. L. J. 285. Trade-mark will not be protected if the owner knowingly misrepresents articles to the public, 37 Cent. L. J. 350.

W. M. ROCKEL.

JETSAM AND FLOTSAM.

RULES FOR ATTAINING MASTERY OF THE ART OF LEGAL ELOQUENCE.

"Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thoughts, not drops of sense:
Press to the close with vigor once begun,
And leave (how hard the task) leave off when done;
Who draws a labor'd length of reasoning out,
Puts straws in line for winds to whirl about:
Who draws a tedious tale of learning o'er,
Counts but the sands on ocean's boundless shore:
Victory in law is gained as battles fought,
Not by the numbers, but the forces brought;
What boots success in skirmish or in fray,
If rout and ruin following close the day?
What worth a hundred posts maintained with skill,
If, these all held, the foe is victor still?
He who would win his cause, with power must frame
Points of support and look with steady aim;
Attack the weak, defend the strong with art,
Strike but few blows, but strike them to the heart;
All scattered fires but end in smoke and noise,
The scorn of men, the idle play of boys.
Keep, then, this first great precept ever near,
Short be your speech, your matter strong and clear,
Earnest your manner, warm and rich your style
Severe in taste, yet full of grace the while;
So may you reach the loftiest heights of fame,
And leave, when life is past, a deathless name."

POWER OF A STATE TO IMPOSE A LICENSE TAX ON FOREIGN CORPORATIONS DOING BUSINESS BUT NOT LOCATED IN THE STATE.

By an opinion which declares foreign corporations, which have no headquarters in Oregon but doing business in this state through agents and on the "order plan," to be exempt from the workings of the recently enacted corporation license law, has been rendered by Attorney-General A. M. Crawford and forms the first breach which it is intended shall be used in curtailing the measure to its minimum.

When the law was first passed it was held by many to demand a license from every corporation whose "drummers" or traveling salesmen operated in this state. The opinion establishes the falsity of such assertion.

The opinion that foreign corporations doing business in Oregon through the work of agents and on the "order plan" are exempt from the workings of the license law, follows:

Hon. F. I. Dunbar, Secretary of State:

DEAR SIR—Relative to your inquiry of recent date as to whether a foreign corporation who occasionally has a representative come into this state, solicit and receive orders for goods, which orders are filled by the corporation by sending the goods from the state where it is domiciled, into this state, must file the statement and pay the annual license fee prescribed by the Act of 1903, permit me to say: I am of the opinion that they are not.

Section 5 of the Act approved February 16, 1903, requires every corporation, foreign or domestic, now doing business in this state, to pay an annual license fee, and if it fails to pay the same, it shall not be permitted to maintain any action, suit of proceeding in the courts of this state, and must pay a fine of $100. A foreign corporation selling goods in this state by sending out agents to take orders and then filling the orders by shipment from outside of the state direct to the customers, is not doing business within the state within the meaning of the act under the rule laid down in the case of the M. N. & M. Co. v. Groton, 26 L. R. A. 135, holding that a "foreign corporation which simply contracts to furnish milling machinery and place it in a mill, without having any office or agency in the state is not carrying on business in the state within the meaning of a statutory prohibition of carrying on business. It is an act of interstate commerce for a foreign corporation to sell and set up machinery in a state where it has no agency or office," and being such can be regulated by congress only.

It is well settled by the courts that a sale of goods in another state by a foreign corporation and a delivery of them in the state constitutes interstate commerce, which cannot be affected by a state statute requiring a foreign corporation to file its articles, etc., as a condition of doing business. 4 Inters. Com. Rep. 260; 2 Tex. Civ. App. 92; 103 U. S. 347; 26 Fed. Rep. 889; 71 Ala. 60.

A sale by sample of goods not yet brought into the state and owned by a non-resident cannot be subjected to a state tax or license fee, as that would be subjected to a state tax or license fee, as that would constitute a regulation of interstate commerce. 120 U. S. 490-502; 128 U. S. 130; 129 U. S. 141; 126 Ind. 471; 83 Ala. 110; 103 N. Car. 349; 36 Kan. 764; 19 Nev. 435.

DR. JOHNSON AND THE ETHICS OF ADVOCACY.

Dr. Johnson was full of prejudices, but on law and lawyers he was remarkably lucid and just. "Sir," said Dr. Johnson, in his famous talk with Boswell on the ethics of advocacy, "a lawyer has no business with the justice or injustice of the cause which he undertakes unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself if he could. If by a superiority of attention, of knowledge, of skill, and a better method of communication he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though were it judicially examined it might be found a very just claim."

When Boswell was thinking of joining the English Bar, a gay friend, he said, advised him against being a lawyer, because he would be excelled by plodding blockheads. "Why, sir," said Dr. Johnson, "in the formulary and statutory part of the law a plodding blockhead may excel, but in the ingenious and rational part of it a plodding blockhead can never excel." "You must not indulge," went on the doctor, "too sanguine hopes should you be called to our bar. I was told by a very sensible lawyer that there are a great many chances against any man's success in the profession of the law. The candidates are so numerous, and those who get large practice are so few. He said it was by no means true that a man of good parts and application is sure of having business, though he, indeed, allowed that if such a man could but appear in a few causes his merit would be known, and he would get forward; and that the great risk was that a man might pass half a lifetime in the courts and never have an opportunity of showing his abilities." This is as much a melancholy truth to-day as it was a hundred years ago. "What means may a lawyer legitimately use to get on?" Nice questions of casuistry arise. "A gentleman," says Boswell, "told me that a countryman of his and mine, Wedderburn—afterwards Lord Loughborough— who had risen to eminence in the law, had when first making his way solicited him to get him employed in city causes. Johnson: 'Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, thereis nothing wrong in a lawyer's endeavoring that he shall have the benefit rather than another.' Boswell: 'You would not solicit employment, sir, if you were a lawyer?' Johnson: 'No, sir; but not because I should think it wrong, but because I should disdain it. However, I would not have a lawyer to be wanting to himself in using fair means. I would have him to inject a little hint now and then to prevent his being overlooked.' "—*Law Journal.*

THE AMERICAN BAR ASSOCIATION MEETING.

The Twenty-sixth Annual Meeting of the Association will be held at Hot Springs, Virginia, on Wednesday, Thursday and Friday, August 26th, 27th and 28th, 1903. The sessions of the Association will be at 10:30 A. M. and 8 o'clock P. M. on Wednesday and Thursday, and at 10:30 o'clock A. M. on Friday, Eastern standard time. The sessions of the Section of Legal Education will be held on Thursday and Friday afternoons at 3 o'clock. The sessions of the Section of Patent, Trade Mark and Copyright Law will be held on Thursday and Friday afternoons at 3 o'clock. On Wednesday afternoon at 3 o'clock there will be a meeting of the Association of American Law Schools. All the meetings will be held at the Homestead Hotel.

PROGRAMME OF THE ASSOCIATION.

Wednesday Morning, 10:30 o'clock.—The President's Address, by Francis Rawle, of Philadelphia, Pennsylvania. Nomination and Election of Members. Election of the General Council. Report of the Secretary. Report of the Treasurer. Report of the Executive Committee.

Wednesday Evening, 8 o'clock.—\ paper by Sir Frederick Pollock, of London, England. Discussion upon the subject of the paper read.

Thursday Morning, 10:30 o'clock.—The Annual Address, by Hon. Le Baron B. Colt, of Rhode Island, United States Circuit Judge for the First Circuit. Reports of Standing Committees. (See Report of 1902, pages 854 and 852, giving a memorandum of subjects referred): On Jurisprudence and Law Reform. On Judicial Administration and Remedial Procedure. On Legal Education and Admission to the Bar. On Commercial Law. On International Law. On Grievances. On Obituaries. On Law Reporting and Digesting. On Patent, Trade Mark and Copyright Law.

Thursday Evening, 8 o'clock.—A paper by William A Glasgow, Jr., of Roanoke, Virginia. Discussion upon the subject of the paper read. Reports of Special Committees. (See Report of 1902, pages 851 and 852): On Classification of the Law. On Indian Legislation. On Uniform State Laws. On Penal Laws and Prison Discipline. On Federal Courts. On Federal Code of Criminal Procedure. On Industrial Property and International Negotiation. On Title to Real Estate. On Louisiana Purchase Exposition. On Comparative Study of World Legislation.

Friday Morning, 10:30 o'clock.—Nomination of Officers. Unfinished business. Miscellaneous business. Election of Officers.

The annual dinner will be given by the association to its members and delegates at the Homestead hotel, at 8 o'clock on Friday evening. A parlor in the hotel will be open as a reception room for the use of members of the association and delegates during the meeting. Members and delegates are particularly requested to register their names, as soon as convenient after their arrival, in the register of the association which will be kept in this room, in order that the list of those present may be complete. The members of the General Council will meet in the reception room at the hotel, on Tuesday evening, August 25th, at 9 o'clock.

The attention of the various standing committees is called to the provision of the by-laws by which such committees are required to meet every year, at such hour as their respective chairmen may appoint, on the day preceding the annual meeting, at the place where the same is to be held. All such committees will also meet at the reception room at the hotel, at 9 o'clock on Tuesday evening, August 25th, for further consultation. The attention of committees is called to the following provisions of the by-laws. "All Committees may have their reports printed by the Secretary before the Annual Meeting of the Association; and any such report, containing any recommendation for action on the part of the Association, shall be printed, together with a draft of bill embodying the views of the committee, whenever legislation shall be proposed. Such report shall be distributed by mail by the Secretary to all the members of the Association at least fifteen days before the Annual Meeting at which such report is proposed to be submitted. No legislation shall be recommended or approved except upon the report of a committee."

It is desirable that all nominations of new members as far as possible, should be submitted to the General Council at its first session on Tuesday evening. The mode of nomination will be found below, and forms will be furnished by the secretary, if desired. Any nomination put in proper form and sent to the secretary before the meeting will be submitted to the General Council at its first session. The dues are $5 a year for members. Delegates who are not members pay no dues. There is no initiation fee. There are no additional dues for membership of a Section.

PROGRAMME OF THE SECTION OF LEGAL EDUCATION.

The sessions will be held on Thursday and Friday afternoons, at 3 o'clock, at the Homestead Hotel. The Address of the Chairman, George W. Kirchwey, Dean of the Columbia Law School. A paper by Lawrence Maxwell, Jr., of Cincinnati, on "Examinations for the Bar." A paper by James Brown Scott, of the Columbia Law School, on "The Place of International Law in Legal Education." A discussion of the general subject of each of the foregoing papers.

PROGRAMME OF THE SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW.

The sessions will be held on Thursday and Friday afternoons, at 3 o'clock, at the Homestead Hotel. 1. An address by Edmund Wetmore, Esq., of New York, as Chairman *pro tempore* of the Section. 2. A paper by Robert H. Parkinson, of Chicago, on some patent law topic, the title of which will be announced later. 3. A paper by M. B. Philipp, of New York, on some trade-mark law topic, the title of which will be announced later. 4. A paper by J. Nota McGill, of Washington, D. C., on some patent law topic to be announced later.

PROGRAMME OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS.

The session will be held on Wednesday, August 26th, at 3 o'clock, at the Homestead Hotel. Address of the President, Simeon E. Baldwin, of the Yale Law School, on "The Study of Elementary Law a Necessary Step in Legal Education." A paper by William S. Curtis, of the St. Louis Law School, on "Examinations in Law Schools." The papers will be followed by a discussion.

OFFICERS OF THE ASSOCIATION.

GENERAL OEFICERS.

President, Francis Rawle, Philadelphia, Pennsylvania. *Secretary*, John Hinkley, 215 N. Charles Street, Baltimore, Maryland. *Treasurer*, Frederick E. Wadhams, 34 Tweddle Building, Albany, New York. *Executive Committee*, The President, the Secretary, the Treasurer, U. M. Rose, Little Rock, Arkansas, *Ex officio;* Charles F. Libby, Portland Maine; Rodney A. Mercur, Towanda, Pennsylvania; James Hagerman, St. Louis, Missouri; P. W. Meldrim, Savannah, Georgia; Platt Rogers, Denver, Colorado.

SECTION OF LEGAL EDUCATION.

George W. Kirchwey, New York, New York, *Chairman*. Charles M. Hepburn, 307 Carlisle Bldg., Cincinnati, Ohio, *Secretary*.

SECTION OF PATENT LAW.

Edmund Wetmore, New York, New York, *Acting Chairman*. Melville Church, 603 McGill, Bldg., Washington, D. C., *Secretary*.

ASSOCIATION OF AMERICAN LAW SCHOOLS.

Simeon E. Baldwin, New Haven, Connecticut, *President*. E. W. Huffcut, Ithaca, New York, *Secretary*.

BOOKS RECEIVED

Handbook of the Law of Principal and Agent. By Francis B. Tiffany, Author of Death by Wrongful Act, Law of Sales, etc. St. Paul, Minn. West Publishing Co., 1903. Sheep, pp. 609. Price, $3.75. Review will follow.

HUMOR OF THE LAW.

At the trial in district court at Winfield a year or two ago, of Charlie Betts, a fourteen year old boy, charged with the murder of an old man named Wiltberger in a lonely place two or three miles from Winfield while attempting with another boy to rob the old man, the line of defense was that Charlie was not at the place of the murder at the time it happened and could not have been, as he was seen near the Santa Fe depot some three miles from the place of the killing at one o'clock on the day in question, that being the hour the murder was said to have been committed. A negro woman testified that she and her sister were at their home by the side of the railway tracks that day, and about the time the one o'clock whistle blew she sent her little boy Kos across to the other side of the tracks to carry word to an old negro man to go up town to help her husband in some work he had secured; and that while watching her own little boy to see that nothing happened to him in crossing the tracks, she noticed the Betts boy, and went on to describe him particularly and tell why she noticed him, with all the minutiæ that characterize a negro's testimony. Her sister then took the stand and told practically the same story. Bill Hackney who was leading counsel for the defense then called for Kos, her little boy, to take the stand. Kos came strutting up to the witness stand, his white sailor collar sticking out stiffly and his kinky locks well oiled, raised his left hand to take the oath, then when told to raise the other hand, promptly did so. He sat in the big arm chair, his feet lacking many inches of reaching the floor. He grinned cheerfully at the crowd, showing a large cavern in his face in which the front teeth were missing causing him to lisp when talking. Mr. Hackney then asked him the following questions:

Q. What's your name? A. Kos Bradford.

Q. How old are you? A. Six years old.

Q. Where do you live? A. Down by de wailwoad twacks.

Q. Was that your mother and aunt on the witness stand a while ago? A. Yeth, thir.

Q. Do you know what an oath is? A. No, thir.

Q. Do you know that you will be punished if you don't tell the truth? A. Yeth, thir (beginning to get a little scared).

Q. Do you remember of hearing of the killing of old man Wiltberger? A. Yeth, thir.

Q. Do you remember now the day you heard about the killing? A. Yeth, thir.

Q. You heard about it the day it happened? A. Yeth, thir.

Q. Did you go across the railroad tracks that day to tell Charlie Aldrich to go up town and help your papa in some work? A. Yeth, thir.

Q. Did you see this little boy (indicating the defendant) that day, about one o'clock on the track by your house? A. Yeth, thir.

Q. You are sure he is the boy you saw? A. O, yeth, thir.

Mr. Hackney then said, with a triumphant look, "That's all!"

Judge Buckman, who was assisting the county attorney in the prosecution, looked rather puzzled as to how to cross-examine such a midget, and seemed about to let him go without asking any questions, when a sudden thought seemed to strike him. He hitched his chair up toward Kos, and putting on his friendliest smile for the pickaninny, said, "You say, Kos, you saw this boy, Charlie Betts, on the railroad

track the day of the murder, about one o'clock?" Kos nodded his head affirmatively. "Well," Judge Buckman said, "You also saw Bill Hackney there too at the same time, didn't you, Kos?" Without a moment's hesitation the little darky lisped out, "Yeth, thir." "That's all," Judge Buckman said, and settled back in his chair, while the court room rang with one mighty shout, the court and jury joining in, while the bailiff rapped vainly for order.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE — Insurable Person. — A railroad ticket agent held authorized in selling an accident policy to a cripple to waive a provision that the policy did not insure any crippled person.—Standard Life & Accident Ins. Co. v. Holloway, Ky., 72 S. W. Rep. 796.

2. ADVERSE POSSESSION — Dower. — Where a widow, after the death of her husband, remains in possession of his lands, it is presumed to be her possession in right of dower.—Reed v. Hackney, N. J., 54 Atl. Rep. 229.

3. ADVERSE POSSESSION—Proof of Title.—In an action for injuries to land, bought by B and wife, plaintiffs, after introducing a deed to the wife, held entitled to prove possession thereunder for a period conferring title by adverse possession.—Bullock v. Lake Drummond Canal & Water Co., N. Car., 43 S. E. Rep. 593.

4. ADVERSE POSSESSION — Use of Bridge. — Railroad company using bridge held to occupy the position of a tenant to the owner of the bridge so as not to be entitled to plead limitations under a void deed.—Pittsburg, C., C. & St. L. R. Co. v. Dodd, Ky., 72 S. W. Rep. 822.

5. AFFRAY — Self-Defense.—Self-defense is available as a defense in a prosecution for an affray.—Coyle v. State, Tex., 72 S. W. Rep. 847.

6. APPEAL AND ERROR—Assignments of Error.—Where assignments of error in rulings as to the admission of evidence do not refer to the page of the transcript where the matters are to be found, the assignments will not be considered.—Reins v. King, Mont., 71 Pac. Rep. 763.

7. APPEAL AND ERROR — Commencement of Proceedings. — A proceeding in error, not begun within a year from the overruling of a motion for a new trial, held subject to dismissal. — Bonanza Lead Min. Co. v. Huff, Kan., 71 Pac. Rep. 849.

8. APPEAL AND ERROR—Death of Party.—Where while a cause was in the court of appeals the plaintiff died, the action was properly revived in circuit court after remand thereto. — Fisher v. Musick's Exr., Ky., 72 S. W. Rep. 787.

9. APPEAL AND ERROR — Exceptions. — The record not showing the purpose for which excluded evidence was offered, or the special objection, an exception thereto will be overruled. — Kendall v. Flanders, N. H., 54 Atl. Rep. 295.

10. APPEAL AND ERROR — Writ of Error.—An appellate court will not on a second writ of error review questions decided on a former writ of error in the same cause.—Stoll v. Loving, U. S. C. C. of App., Sixth Circuit, 120 Fed. Rep. 805.

11. APPEARANCE — Defect in Process. — Where a nonresident defendant, defectively served with notice, makes a special appearance and invites an inquiry as to the sufficiency of a pleading, he waives any defect in the process. — Thompson v. Pfeiffer, Kan., 71 Pac. Rep. 828.

12. ARREST — Failure to Account. — An agent who fails to account for his principal's goods, sold by him, cannot be held in arrest and bail, where the jury find that the deficiency was not due to misappropriation or embezzlement. — Southern Grocery Co. v. Davis, N. Car., 43 S. E. Rep. 591.

13. ASSAULT AND BATTERY—Erroneous Instructions.—In an action for aggravated assault, an instruction limiting defendant's rights as to self-defense, on the action of another in provoking the difficulty, without reference to whether defendant knew thereof, held error.—Kees v. State, Tex., 72 S. W. Rep. 855.

14. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Mechanics' Liens.—Assignee of general contractor for benefit of creditors takes title to funds due assignor subject to mechanics' liens.—John P. Kane Co. v. Kinney, N. Y., 66 N. E. Rep. 619.

15. ASSOCIATIONS — Trust Fund for Creditors. — The assets of a defunct voluntary association do not constitute a trust fund for the benefit of creditors in the hands of purchasers of such assets. — Industrial Lumber Co. v. Texas Pine Land Assn., Tex., 72 S. W. Rep. 875.

16. ATTACHMENT — Absent Debtor.—Where defendant, in attachment against an absent debtor, has a dwelling house and usual place of abode within the state where a summons might be served, the attachment should be dismissed. — C. B. Coles & Sons Co. v. Blythe, N. J., 54 Atl. Rep. 240.

17. ATTORNEY AND CLIENT—Revival of Action.—On revival of action after death of the plaintiff, where the subsequent proceedings were in the name of the executor by the former attorney for plaintiff, the defendant could not object to his authority to so act. — Fisher v. Musick's Exr., Ky., 72 S. W. Rep. 787.

18. BAIL — Forfeiture.—A recognizance for appearance at a certain term is not invalidated by the failure of the term of court because of an adjournment or continuance of such term.—Bartling v State, Neb., 93 N. W. Rep. 1047.

19. BANKRUPTCY — Appeal.—On appeal by a creditor of a bankrupt from an order approving a composition, under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties. — Marshall Field & Co. v. Wolf & Bro. Dry Goods Co., U. S. C. C. of App., Eighth Circuit, 120 Fed. Rep. 815.

20. BANKRUPTCY—Attorney's Fees.—A voluntary bankrupt's attorney held not entitled to charge the estate for services in posting the bankrupt's books and in making extra copies of the schedules. — *In re* Connell & Sons, U. S. D. C., M. D. Pa., 120 Fed. Rep. 846.

21. BANKRUPTCY — Attorney for Bankrupt. — Under Bankr. Act, § 64b, U. S. Comp. St. 1901, p. 3447, the court

may allow an attorney for the bankrupt in a voluntary proceeding for services actually rendered in good faith for the real purpose of impartially administering the estate. — *In re* Rosenthal & Lehman, U. S. D. C., E. D. Mo., 120 Fed. Rep. 848.

22. BANKRUPTCY — Reimbursement of Surety. — The claim of a surety for a bankrupt for reimbursement on account of money paid in discharge of his obligation belongs in the same class as claims of general or unsecured creditors. — Livingstone v. Heineman, U. S. C. C. of App., Sixth Circuit, 120 Fed. Rep. 786.

23. BENEFIT SOCIETIES — By-Laws of Order. — The holder of a life benefit certificate who had paid benefit assessments held not released from duty to pay other assessments. — Supreme Council, American Legion of Honor v. Landers, Tex., 72 S. W. Rep. 880.

24. BENEFIT SOCIETIES—Rights of Members.—A member of a fraternal insurance association, who is denied rights to which he is entitled under its by-laws, must first appeal as provided by the laws of the order — Modern Woodmen of America v. Taylor, Kan., 71 Pac. Rep. 806.

25. BILLS AND NOTES — Indorsement. — The signature of a third party on the back of a note before it was put in circulation neither expressed nor implied any contract. —Elliott v. Moreland, N. J., 54 Atl. Rep. 224.

26. BOUNDARIES — Report of Surveyor. — One who has brought proceedings to locate a boundary line cannot bring an independent action to set aside the report of the surveyor. — Close v. Huntington, Kan., 71 Pac. Rep. 812.

27. BRIBERY—Illegal Arrest.—A prisoner held under an illegal arrest cannot be convicted of offering to bribe the officer to allow him to escape. — *Ex parte* Richards, Tex., 72 S. W. Rep. 838.

28. BRIDGES — Ultra Vires Act. — The approach to a bridge is a part thereof, so that an attempted conveyance by a company chartered to build and operate a bridge of an approach thereto is *ultra vires*. — Pittsburg, C., C. & St. L. R. Co. v. Dodd, Ky., 72 S. W. Rep. 822.

29. BROKERS—Misrepresentation —If one employed as agent in the sale of real estate fraudulently misrepresents the facts, he forfeits any right to compensation, and all gains he may make belongs to his principal.— Jefferies v. Robbins, Kan., 71 Pac. Rep. 852.

30. CANALS—Injury from Construction.—Where it does not appear what amount of land, if any, canal company ever condemned under Act 1790, § 10, it will be presumed that the land which it occupies was acquired under a mere easement commensurate with its use. — Pinnix v. Lake Drummond Canal & Water Co., N. Car., 43 S. E. Rep. 578.

31. CANCELLATION OF INSTRUMENTS — Decree. — A bill for the cancellation of an instrument for fraud will not support a decree which, although finding the instrument valid, enjoins the defendant from misrepresenting its legal effect as construed by the court. — Kerr v. Southwick, U. S. C. C. of App., Second Circuit, 120 Fed. Rep. 772.

32. CARRIERS — Connecting Lines. — Carrier guaranteeing safety of car used to transfer stock held liable for injuries due to its defective condition, though received on connecting line. — Burnside & C. R. Ry. Co. v. Tupman, Ky., 72 S. W. Rep. 786.

33 CARRIERS — Injury to Drunken Passenger. — If a passenger would not have fallen from a car platform but for his drunkenness, it was the proximate cause of the accident. — Houston & T. C. R. Co. v. Bryant, Tex., 72 S. W. Rep. 885.

34. CARRIERS — Injury to Passenger. — It is not negligence *per se* for a motorman to open the gate on the front platform of a trolley car before the car has come to a full stop. — Paginini v. New Jersey St. Ry. Co., N. J., 54 Atl. Rep. 218.

35. CARRIERS — Passenger.—One who pays a brakeman on a passenger train money to be carried to a certain point, and who follows his instructions, is not a passenger. — Mendenhall v. Atchison, T. & S. F. Ry. Co., Kan , 71 Pac. Rep. 846.

36. CARRIERS — Wrongful Expulsion. — Where a passenger is improperly expelled from a train, he is entitled to damages for the humiliation and disgrace, though no one was present besides the conductor and the brakeman. — Kansas City, Ft. S. & M. R. Co. v. Little, Kan., 71 Pac. Rep. 820.

37. CONTRACTS — Supervision of Engineer. — A contractor, constructing a sewer, held not excused from following the directions of the supervising engineer because he acted unreasonably. — National Contracting Co. v. Commonwealth, Mass., 66 N. E. Rep. 639.

38. COPYRIGHTS—Loss of Right to Protection.—Owner of copyrighted literary production does not lose his exclusive property therein because a licensee, authorized to publish the article on condition that he print therewith the usual copyright notice, inadvertently omits to do so —American Press Assn. v. Daily Story Pub. Co., U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 766.

39. CORPORATIONS—Accounting in Fiduciary Capacity. —Purchase by promoter of a consolidated corporation of one of the properties to be consolidated held not made by him in a fiduciary capacity. — Tompkins v. Sperry, Jones & Co., Md., 54 Atl. Rep. 254.

40. CORPORATIONS— Foreign Corporation Act.— A foreign corporation may be sued upon a contract made in a foreign state without complying with the corporation act, requiring a certificate to be filed in the state.—MacMillan Co. v. Stewart, N. J , 54 Atl. Rep. 240.

41. CORPORATIONS — Right to Office. — The court will not dispossess an officer of a corporation pending the determination of a dispute as to the title to the office.— Standard Gold Min. Co. v. Byers, Wash., 71 Pac. Rep. 766.

42. CORPORATIONS — Right to Sue. — Minority stockholders of a corporation held entitled to sue on behalf of the corporation to enforce a contract.—Pittsburg, C., C. & St. L. R. Co. v. Dodd, Ky., 72 S. W. Rep. 822.

43. COUNTIES — Liability of Bond. — Where a deputy county auditor issues fraudulent redemption orders, and obtains money thereon from the county treasurer, the treasurer and his sureties are liable for the amount so paid.—Board of Com'rs of Ramsey County v. Edmond, Minn., 93 N. W. Rep. 1054.

44. COURTS—Jurisdiction.—Where a stranger to an action files a motion to intervene which is subsequently withdrawn on leave of court, he has not submitted to the jurisdiction of the court so as to be barred from pleading personal privilege. — Sites v. Lane, Tex., 72 S. W. Rep. 873.

45. COURTS — Unliquidated Damages. — Unliquidated damages cannot be set off in suits in the district court.— Slayton-Jennings Co. v. Specialty Paper Box Co., N. J., 54 Atl. Rep. 247.

46. CRIMINAL EVIDENCE—Corpus Delicti.— Confession may be looked to with the other evidence in determining whether the *corpus delicti* is established.— Gray v. State, Tex., 72 S. W. Rep. 858.

47. CRIMINAL TRIAL —Admission to Prevent Continuance.—To prevent a continuance of a criminal prosecution for an absent witness, defendent may admit that the witness would testify as set out in the affidavit for the continuance.—State v. Lewis, Wash., 71 Pac. Rep. 778.

48. CRIMINAL TRIAL—Continuance.—The granting of a continuance in a criminal case on the ground of the absence of material evidence on the part of the defendant is a matter for the discretion of the trial court.— State v. Croney, Wash., 71 Pac. Rep. 783.

49. CRIMINAL TRIAL — Copy of Indictment.— It is too late after verdict to complain that the statute giving accused the right to a two-day service of a copy of the indictment before trial has not been complied with.—Burrows v. State, Tex., 72 S. W. Rep. 848.

50. CRIMINAL TRIAL — Instructions. — It is error to charge the jury that they may consider the fact that the

public in a certain locality think the defendants guilty as corroborative of the facts proven.— State v. Whitehead, N. J., 54 Atl. Rep. 229.

51. CRIMINAL TRIAL—Instruction as to "Doubt."—A requested instruction that if the jury entertained a "doubt" as to the degree of the murder they should convict of murder in the second degree was properly refused.—State v. May, Mo., 72 S. W. Rep. 918.

52. CRIMINAL TRIAL—Law Book in Jury Room.—An examination of the Code by a juror in the jury room held ground for reversal — Henson v. State, Tenn., 72 S. W. Rep. 960.

53. CRIMINAL TRIAL — Statement of Facts. — Misconduct of the district attorney in argument cannot be reviewed, where defendant did not request a special charge that the jury should disregard the argument.—McAnally v. State, Tex., 72 S W. Rep. 842.

54. CUSTOMS AND USAGES — Proof of Trade.—To warrant proof of a trade custom to explain the meaning of the contract, it is not necessary that such custom should have existed for any considerable length of time.—Rastetter v. Reynolds, Ind., 66 N. E. Rep. 612.

55. DEATH—Accrual of Action in Another State. — Enforcement in Arkansas of action for wrongful death accruing in Louisiana held not to contravene public policy in view of the similarity between Civ. Code La. art. 2315 and Sand. & H. Dig. §§ 5908, 5911, 5912.—St. Louis, I. M. & S. Ry. Co. v. Robertson, Ark., 72 S. W. Rep. 893.

56. DESCENT AND DISTRIBUTION — Liability of Heirs.—The heirs of a decedent take their distributive share subject to all equities in favor of the estate against them personally and against one through whom they may inherit.—Head v. Spier, Kan., 71 Pac. Rep. 833.

57. DISMISSAL AND NONSUIT — Foreclosure. — Where an action was instituted against a voluntary association for personal judgment and foreclosure of a lien, a dismissal as to the money judgment did not dismiss the action for foreclosure. — Industrial Lumber Co. v. Texas Pine Land Assn., Tex., 72 S. W. Rep. 875.

58. DISMISSAL AND NONSUIT — Want of Jurisdiction.—A motion for nonsuit, treated as a motion to dismiss for want of jurisdiction, may properly be made after verdict.—Parker v. Southern Exp. Co., N. Car., 43 S. E. Rep. 608.

59. DISORDERLY CONDUCT — Practice of Palmistry.—An ordinance providing that all persons who use palmistry or like crafty science shall be adjudged disorderly persons is valid.— State v. Kenworth, N. J., 54 Atl. Rep. 244.

60. EASEMENTS — Adverse Possession. — An adverse possession which will defeat a right of way acquired by adverse user must be such as would defeat a right of entry on real estate. — Clay v. Kennedy, Ky., 72 S. W. Rep. 815.

61. EJECTMENT—Boundary Line.—In ejectment, on an issue as to the boundary line between two adjoining tracts, the burden of proving the correct line is on plaintiff.—Harper v. Anderson, N. Car., 43 S. E. Rep. 588.

62. EMBEZZLEMENT—Information. — Proof of the conversion of either a smaller or larger sum than that specified in an information against an agent for larceny will sustain a conviction.—State v. Lewis, Wash., 71 Pac. Rep. 778.

63. EMBEZZLEMENT—Public Officer.— On trial of a city treasurer for embezzlement, it is no defense that he collected such moneys from persons engaged in unlawful traffic in liquors, under an arrangement under which such persons secured immunity from prosecution. — State v. Patterson, Kan., 71 Pac. Rep. 860.

64. ESTOPPEL—Covenants of a Deed.—An estoppel by the covenants of a deed is overcome by the estoppel created by the subsequent judgment of a competent tribunal.—Boynton v. Haggart, U. S. C. C. of App., Eighth Circuit, 120 Fed. Rep. 819.

65. EVIDENCE—Damages. — In an action for damages for defendant's failure to furnish plaintiff return transportation to his home, evidence as to the earning of those engaged in plaintiff's occupation at his home held proper. — Johnson v. San Juan Fish & Packing Co., Wash., 71 Pac. Rep. 787.

66. EVIDENCE— Hypothetical Questions.— Hypothetical questions asked of an expert held not objectionable on the ground that the facts assumed were not conceded or established by the evidence.—Orient Ins. Co. v. Leonard, U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 808.

67. EVIDENCE—Res Gestæ.—Declaration of one, within two minutes after his legs were cut off, as to how it happened, held part of the *res gestæ*.— Murray v. Boston & M. R. R., N. H., 54 Atl. Rep. 289.

68. EVIDENCE — Res Gestæ.— A statement to a third person by the agent who issued an accident policy, after an accident in which insured was injured, held inadmissible as *res gestæ*.—Standard Life & Accident Ins. Co. v. Holloway, Ky., 72 S. W. Rep. 796.

69. EXECUTION—Parol Agreement.—A voluntary parol agreement to allow an execution debtor to redeem land sold at execution sale, made after the statutory period for redemption has expired, is unenforceable by the debtor.—Herring v. Johnson, Ky., 72 S. W. Rep. 798.

70. EXECUTORS AND ADMINISTRATORS— Commissions. —An executor held not entitled to commission on appreciation in value of securities. — *In re* Davidson, Pa., 54 Atl. Rep. 273.

71. EXECUTORS AND ADMINISTRATORS— Foreign Guardian.—The payment of a legacy to the guardian of the legatee, appointed in another state, and who, with the legatee, is a resident of such other state, is valid.— Gardiner v. Thorndike, Mass., 66 N. E. Rep. 638.

72. EXTRADITION— Change of Charge.— One brought from another state under a charge of robbery may be tried under an information charging larceny from the person without first being given time to return to such other state.—State v. Dunn, Kan., 71 Pac. Rep. 811.

73. EXTRADITION — Embezzlement. — A stockholder, agreeing to give his entire attention to the corporation in consideration of 40 per cent. of the profits, held a person "hired or salaried," within French extradition treaty authorizing extradition for embezzlement.—*In re* Balensi, U. S. C. C., S. D. N. Y., 120 Fed. Rep. 864.

74. FIRE INSURANCE—Arbitration Clause of Policy.— A provision in an insurance policy for arbitration of the amount of the loss, as a condition precedent to a right to sue, is waived when the insurer denies liability. — Stoddard v. Cambridge Mut. Fire Ins. Co., Vt., 54 Atl. Rep. 284.

75. FIXTURES — Trover. — To render chattels a part of the realty, there must be actual annexation, with an intent to make a permanent accession to the freehold.—Temple Co. v. Penn Mut. Life Ins. Co., N. J., 54 Atl. Rep. 295.

76. FORGERY—Indictment.—An indictment for forging a bank check held not objectionable on the ground that it purported to be drawn against any first national bank and not on the first national bank of the city where drawn.—Albert v. State, Tex., 72 S. W. Rep. 846.

77. FRAUDS, STATUTE OF—Implied Contract. — Though one cannot, on account of the statute of frauds, recover for breach of a contract of employment, he, having sold a business for less than its value, may, on an implied contract, recover the difference between the amount paid and the value. — Bethel v. A. Booth & Co., Ky., 72 S. W. Rep. 803.

78. FRAUDS, STATUTE OF — Parol Contract. — A verbal contract for the sale for $845 of a claim against a third person held to be within the sixth section of the statute of frauds, and void. — French v. Schoonmaker, N. J., 54 Atl. Rep. 225.

79. GIFTS — Causa Mortis. — A delivery of the notes of another to a trustee, with direction to collect and distribute the proceeds among named beneficiaries, is a good gift *inter vivos*.—Calvin v. Free, Kan., 71 Pac. Rep. 823.

80. HABEAS CORPUS — Res Judicata. — Matters in issue, arising on same state of facts determined in prior *habeas corpus* proceeding over custody of child, held *res judicata.—In re* Hamilton, Kan., 71 Pac. Rep. 817.

81. HEALTH—Quarantine.—Under Gen. St. 1894, § 7059, a county held liable to a township for necessary expenses incurred for medical treatment and in maintaining quarantine of a resident family sick with a contagious disease. — Town of Louriston v. Board of Comrs. of Chippewa County, Minn., 93 N. W. Rep. 1053.

82. HIGHWAYS — Constitutional Law. — Acts 1897, p. 87, providing a road system for certain specified counties, is constitutional, though the notice of intention to apply therefor was not given. — Watkins v. Hopkins County, Tex., 72 S. W. Rep. 872.

83. HIGHWAYS — Establishment. —A slight variation in laying out a public road, due to the erection of houses by the prosecutors on the line described in the application, will not nullify the proceedings. — Whittingham v. Hopkins, N. J., 54 Atl. Rep. 250.

84. HOMESTEAD — Temporary Removal.—A temporary removal from a country homestead to the city to furnish children with educational advantages is not an abandonment of the homestead. — Herring v. Johnston, Ky., 72 S. W. Rep. 793.

85. INDEMNITY — Use of Railroad Bridge. — A bridge company entitled to recover from certain railroad companies the amount of a judgment and costs incurred by it in behalf of the railroad companies held not entitled to recover from the solvent railroad companies the amount due from certain insolvent ones. —Pittsburg, C., C. & St. L. R. Co. v. Dodd, Ky., 72 S. W. Rep. 822.

86. INJUNCTION — Railroad Right of Way.—Railroad, in occupation of land under a deed and proceedings in eminent domain, held entitled to enjoin a second company, seeking by force to oust it from the land. — Pennsylvania Co. v. Ohio River Junction R. Co., Pa., 54 Atl. Rep. 259.

87. INJUNCTION — Title to Office.—A mandatory injunction will not lie in replevin for property belonging to an office in a corporation; the only thing in dispute being the title to the office. — Standard Gold Min. Co. v. Byers, Wash., 71 Pac. Rep. 766.

88. INTEREST — Usury. — Under Gen. St. 1901, § 3594, an agreement by the makers of a note to pay interest at 6 per cent until maturity and 10 per cent after that time is valid.—Holmes v. Dewey, Kan., 71 Pac. Rep. 836.

89. INTOXICATING LIQUORS — Local Option.—The legislature in amending the provisions of the local option law cannot affect territory in which the law is already in force.—*Ex parte* Elliott, Tex., 72 S. W. Rep. 887.

90. JUDGMENT — Non Obstante Veredicto. — A motion for judgment *non obstante veredicto* is not granted in favor of a defendant.—Stoddard v. Cambridge Mut. Fire Ins. Co., Vt., 54 Atl. Rep. 284.

91. JUDICIAL SALES — Tax Sale of Land. — Where on a judicial sale of lands, taxes are not paid from the price before confirmation, the same may be done after confirmation, while the funds are under the control of the court.—Brown v. Timmons, Tenn., 72 S. W. Rep. 958.

92. JURY — Qualification — A juror, stating that he has a prejudice against non-residents bringing actions which they might have brought in the state of their residence, held disqualified in such a case.—Naylor v. Metropolitan St. Ry. Co., Kan., 71 Pac. Rep. 835.

93. JURY — Venire.—An accused has no vested right in the number of jurors provided for in the venire to fill incomplete panels.—State v. Croney, Wash., 71 Pac. Rep. 788.

94. LANDLORD AND TENANT — Attornment. — Attornment of tenant to third person under threatened eviction held not to release tenant from liability to landlord for rent.—Alford v. Carver, Tex., 72 S. W. Rep. 869.

95. LANDLORD AND TENANT — Nuisance. — Where a landlord lets premises, the occupation of which subsequently constitutes a nuisance, the landlord is not liable, unless the nuisance complained of arose necessarily from such use. — Louisville & N. Terminal Co. v. Jacobs, Tenn., 72 S. W. Rep. 954.

96. LIBEL AND SLANDER — Compensatory Damages.— For the purpose of mitigating exemplary damages, the publisher of a libel may show that he believed the statements to be true, and was innocent of any intent to injure, or of any ill will towards his victim; but such evidence is inadmissible to affect the compensatory damages. — Palmer v. Mahin, U. S. C. C. of App., Eighth Circuit, 120 Fed. Rep. 737.

97. LIBEL AND SLANDER — Evidence of Public Rumor. —In libel, evidence as to a public rumor affecting the character of plaintiff held not to tend to disprove malice or show good faith. — Harrison v. Garrett, N. Car., 43 S. E. Rep. 594.

98. LIBEL AND SLANDER — Privileged. — Defamatory matter concerning a stranger in a pleading is absolutely privileged, if it is pertinent to the issues of the suit.— Crockett v. McLanahan, Tenn., 72 S. W. Rep. 950.

99. LIMITATION OF ACTIONS — Acknowledgment. — An acknowledgment, to bar the statute of limitations, must be unequivocal and a direct admission of a present existing liability. — Durban v. Knowles, Kan., 71 Pac. Rep. 829.

100. LIMITATION OF ACTIONS — Death of Party. —When a claim for rent for a certain year is first made in an amended petition, filed after the time within which an action could be brought therefor, the claim is barred.— Fisher v. Musick's Exr., Ky., 72 S. W. Rep. 787.

101. MANDAMUS — Propriety of Remedy. — *Mandamus* will not lie to compel the transfer of corporate stock on the books of the company merely because the right is clear; there being an adequate remedy at law, or at least in equity.—Clarke v. Hill, Mich., 93 N. W. Rep. 1044.

102. MARITIME LIENS — Vessel in Dry Dock.—Neither a dry dock fitted into piers, to which it is held by cleats, so that it has only a vertical motion, nor a steamer therein for repairs, is a vessel in navigable waters, so as to give a maritime lien for a tort thereon. — The Warfield, U. S. D. C., E. D. N. Y., 120 Fed. Rep. 847.

103 MASTER AND SERVANT — Assumed Risk.—A miner does not assume the risk incident to a substitution of a more dangerous explosive, where he is not notified thereof.—Chambers v. Chester, Mo., 72 S. W. Rep. 904.

104. MASTER AND SERVANT — Fellow-Servants. — Car repairers and inspectors held not fellow-servants of a conductor of a train. — McDonald v. Michigan Cent. R. Co., Mich., 93 N. W. Rep. 1041.

105. MASTER AND SERVANT — Negligence. — Where a servant of W, while in a safe position, at the request of the engineer of an elevator company, engaged in an independent employment, attempted to loosen the elevator, and was killed, held that W was not liable. — Longa v. Stanley Hod Elevator Co., N. J., 54 Atl. Rep. 251.

106. MASTER AND SERVANT — Negligence of Foreman.— A master held not liable to an employee for the negligence of a mere foreman. — Southern Indiana Ry. Co. v. Martin, Ind., 66 N. E. Rep. 886.

107. MINES AND MINERALS — Adverse Mining Claim.— In an action to set aside an adverse claim of a mining claim, when defendant had not made a valid location, errors, if any, in ruling as to evidence of a location by a third party prior to plaintiff's location, were immaterial. —Reins v. King, Mont., 71 Pac. Rep. 763.

108. MINES AND MINERALS—Right to Terminate Lease. —Gas lease held not continued in force by drilling of well, with failure to use gas therefrom. — American Window Glass Co. v. Williams, Ind., 66 N. E. Rep. 912.

109. MORTGAGES — Absolute Deed.—Where property is conveyed by a debtor to a creditor by deed absolute in form to secure the debt, they may thereafter make the conveyance absolute by oral agreement. — Cramer v. Wilson, Ill., 66 N. E. Rep. 869.

110. MORTGAGES — Assignment. — Holder of an unrecorded assignment of a mortgage cannot foreclose, as against a purchaser for a valuable consideration, with-

out proving that such purchaser had actual knowledge of the assignment. — Artz v. Yeager, Ind., 66 N. E. Rep. 917.

111. MORTGAGES — Assignment.—Where assignment of note and mortgage has been recorded, the maker may pay the holder, claiming the right to collect and receive the cancellation of the mortgage. — Casner v. Johnson, Kan., 71 Pac. Rep. 819.

112. MORTGAGES — Failure of Consideration.—Where it was agreed between mortgagor and mortgagee that the money was to be applied on the price of the property and for improvements, the fact that none of the proceeds ever came directly into the hands of the mortgagor was not a failure of consideration. — Ball v. Marske, Ill., 66 N. E. Rep. 845.

113. MORTGAGES—Lien.— Where a mortgage is foreclosed as to a portion of the debt, all being due and all the mortgaged property sold, the lien of the mortgage is terminated as to creditors and purchasers under foreclosure.— Nebraska Loan & Trust Co. v. Haskell, Neb., 93 N. W. Rep. 1045.

114. MORTGAGES — Notice of Uncanceled Mortgage.— One who purchases land with notice of an uncanceled mortgage thereon is charged with notice of whatever rights the mortgagee or those claiming under him have. —Collins v. Davis, N. Car., 43 S. E. Rep. 579.

115. MUNICIPAL CORPORATIONS — Change of Street Grade.—Where a city is about to change the grade of a street on which a building stands, that the owner secures a modification of the proposed change, resulting in less injury to him, does not bar his right to damages for the change actually made. — Klaus v. Jersey City, N. J., 54 Atl Rep. 220.

116. MUNICIPAL CORPORATIONS— City Council.—A determination by the city council is voidable, if any of the council was disqualified by private interests. — Drake v. City of Elizabeth, N. J., 54 Atl. Rep. 248.

117. MUNICIPAL CORPORATIONS— Employment by City. —Under ordinances providing that the compensation of a counselor assisting the city solicitor shall be paid by such solicitor, a taxpayer is not entitled to question by *certiorari* the validity of a resolution of the council employing a counselor for that purpose.—Cole v. Atlantic City, N. J., 54 Atl. Rep. 226.

118. MUNICIPAL CORPORATIONS—Violation of Criminal Statute.—A municipal corporation cannot maintain a suit for the violation of a criminal statute.—Town of McMinnville v. Stroud, Tenn., 72 S. W. Rep. 949.

119. NEGLIGENCE — Burden of Proof. — It is error in a personal injury case to instruct that the burden of proving contributory negligence is on defendant, where the issue has been raised by testimony produced by plaintiff.—Missouri, K. & T. Ry. Co. of Texas v Jolley, Tex., 72 S. W. Rep. 871.

120. NEGLIGENCE—Death by Wrongful Act.—In an action for death by wrongful act, an instruction that the defense of contributory negligence will not avail, if defendant by the exercise of reasonable care could have avoided the accident, held to correctly state the law. — Turnbull v. New Orleans & C. R. Co., U. S. C. C. of App., Fifth Circuit, 120 Fed. Rep. 788.

121. NUISANCE— Cattle Killed in Railroad Accident.— Railroad company held liable for nuisance created by butchers depositing, under contract with company, near third person's premises, carcasses of cattle killed in accident.—Gulf, C. & S. F. Ry. Co. v. Chenault, Tex., 72 S. W. Rep. 868.

122. NUISANCE — Location of Roundhouse. — Charter right of corporation to erect terminal facilities where it saw fit held no defense in action against it for damages from nuisance consisting of roundhouse erected by it.— Louisville & N. Terminal Co. v. Jacobs, Tenn., 72 S. W. Rep. 954.

123. OFFICERS—Diminution.— Compensation of a public officer is not affected by diminution of the duties of the office, the office itself remaining.— Bennett v. City of Orange, N. J., 54 Atl. Rep. 249.

124. PARTITION — Appeal. —A decree for partition, unappealed from, cannot be reviewed on an appeal from an order confirming the report of commissioners. — Austin v. Austin, Mich., 93 N. W. Rep. 1045.

125. PARTY WALLS—Contribution.— Making use of rebuilt party wall held not to render adjoining owner liable to contribute thereto.—Griffin v. Sansom, Tex., 72 S. W. Rep. 864.

126. PATENTS — Negligence of Attorney.— The negligence of an attorney, which works the abandonment of an application for a patent under the statute, does not constitute unavoidable delay, which will avoid the effect of such abandonment as to the applicant.—Lay v. Indianapolis Brush & Broom Mfg. Co., U. S. C. C. of App., Seventh Circuit, 120 Fed. Rep. 831.

127. PLEADING—Waiver of Defects.— Where, in libel, the publication is not libelous *per se*, and the complaint fails to allege special damages, a failure to demur waives the defect.—Harrison v. Garrett, N. Car., 43 S. E. Rep. 594.

128. POWERS—Wills.— Where a will gave all testator's property to his widow for life, and provided that in case of necessity the widow might sell any of it for the benefit of the family, a sale of realty by the widow was valid, though no actual necessity existed. — Matthews v. Capshaw, Tenn., 72 S. W. Rep. 964.

129. PRINCIPAL AND AGENT—Notice to Agent.—Where an agent acts for himself adversely to his principal in a given transaction, neither notice to nor knowledge of the agent can be lawfully imputed to the principal. — Central Coal & Coke Co. v. George S. Good & Co., U. S. C. C. of App., Eighth Circuit, 120 Fed. Rep. 793.

130. PRINCIPAL AND AGENT—Sale of Goods.—Provision in contract whereby agent was to account for goods sold at invoice prices held not a stipulation that none should be sold at less.—Southern Grocery Co. v. Davis, N. Car., 43 S. E. Rep. 591.

131. PRINCIPAL AND SURETY— Signing on Condition.— A surety, though signing on condition that another sign as surety, which was not done, is liable; the bond having been delivered without the obligee knowing of the condition. — Seaton v. McReynolds, Tex., 72 S. W. Rep. 874.

132. PUBLIC LANDS—Innocent Purchaser.—There is no such thing as an innocent purchaser as against the state claiming under a patent issued without authority of and contrary to law.— Kempner v. State, Tex., 72 S. W. Rep. 888.

133. QUIETING TITLE—Trustee's Suit to Remove Cloud.— Where a deed to realty is made to one in his own name, that the conveyance was in trust for another does not preclude him from maintaining a suit to remove cloud. —McLeod v. Lloyd, Oreg., 71 Pac. Rep. 795.

134. RAILROADS — Contributory Negligence —Where a jury found that plaintiff was not guilty of contributory negligence, and that her death was due to defendant's negligence, it was not necessary that it should pass on the doctrine of last clear chance. — Harris v. Atlantic C. L. Ry. Co., N. Car., 43 S. E. Rep. 589.

135. RAILROADS—Fire Set by Locomotive.— If railroad company operated defective engines, or negligently operated engines in approved condition, in either case it would be liable for resulting fires.—Norfolk & W. Ry. Co. v. Perrow, Va., 43 S. E. Rep. 614.

136. RAILROADS — Look and Listen.— Driver of team approaching railroad track, if necessary to see track, should get down from his wagon and lead his horses.— Kinter v. Pennsylvania R. Co., Pa., 54 Atl. Rep. 276.

137. RAILROADS — Look and Listen. — In an action for negligent death at a railroad crossing, it was not negligence as a matter of law, under the circumstances, for deceased to fail to look down the track.— Stoy v. Louisville, E. & St. L. Consol. R. Co., Ind., 66 N. E. Rep. 615.

138. RECEIVERS— Action Against. — An action will lie against a receiver for a wrongful act of the corporation

committed before his appointment.— Ratcliff v. B. Baer & Co., Ark., 72 S. W. Rep. 896.

139. RECEIVERS—Appointment.— The appointment of a receiver is an extraordinary remedy, and cannot properly be resorted to in a suit, the sole purpose of which is to collect a debt, where it is not alleged that the debtor is insolvent, or that he has not property subject to execution sufficient to satisfy the decree prayed for.—Joseph Dry Goods Co. v. Hecht, U. S. C. C. of App., Fifth Circuit, 120 Fed. Rep. 760.

140. REPLEVIN—Title to Office.—The title to an office in a corporation cannot be tried by replevin for possesion of the property belonging thereto. — Standard Gold Min. Co. v. Byers, Wash., 71 Pac. Rep. 766.

141. SALES—Acceptance. — In an action for goods sold and delivered, it is not necessary to show an acceptance of the goods by the buyer.— Rastetter v. Reynolds, Ind., 66 N. E. Rep. 612.

142. SALES—Passing of Title.—Where it is the intent of parties to a contract of sale of personalty that the title shall presently pass, such intent will govern, though possession is retained by the vendor.—Barber v. Thomas, Kan., 71 Pac. Rep. 845.

143. SHERIFFS AND CONSTABLES — Attachment. — A seizure of property by an officer under a void attachment is a naked trespass, as against a stranger in rightful possession.—Hagar v. Hass, Kan., 71 Pac. Rep. 822.

144. SHIPPING — Improper Food. — Passengers by sea, other than cabin passengers, coming to the United States from a foreign port, who without necessity are furnished with bad and improper food, are entitled to recover as damages an amount equal to the amount fixed by the statute in case of shortallowance. — The European, U. S. C. C. of App., Fifth Circuit, 120 Fed. Rep. 776.

145. SLAVES — Legitimacy of Children.— Code 1887, § 2227, relating to the legitimacy of children of colored persons who under certain conditions cohabited prior to February 27, 1866, applies only where such persons had agreed to occupy the relation of husband and wife. —Patterson v. Bingham, Va., 43 S. E. Rep. 609.

146. STATUTES — Death by Wrongful Act.— In suing in Arkansas for a death by wrongful act occurring in Louisiana, it is not necessary to set out Louisiana statute in *hæc verba*, but it is sufficient to set out its substance and effect.—St. Louis, I. M. & S. Ry. Co. v. Robertson, Ark., 72 S. W. Rep. 893.

147. STIPULATIONS — Judgment on Pleading.—Where, in an action on an alleged contract, the parties stipulate that whatever contract was made is contained in letters attached to the stipulation, the court, if the letters do not sustain the contract should render judgment on the pleadings and the stipulation. — Jeffries v. Robbins, Kan., 71 Pac. Rep. 852.

148. STREET RAILROADS — Contributory Negligence.— Contributory negligence of plaintiff will not preclude a recovery in an action against a street railway company, where defendant's servants could have discovered his peril in time to avoid injury to him.—Klockenbrink v. St. Louis & M. R. R. Co., Mo., 72 S. W. Rep. 900.

149. STREET RAILROADS — Contributory Negligence.— It is not contributory negligence as a matter of law to drive across a street car track in front of an approaching car, seen by the driver 100 yards away, but the question is for the jury. — Richmond Traction Co. v. Clarke, Va., 43 S. E. Rep. 618.

150. STREET RAILROADS — Ejectment of Trespasser.— Where an infant was frightened into jumping from a street car on which he was a trespasser by the conductor's orders, and was precipitated under the car by the falling of sand on which he alighted, the conductor's negligence was the proximate cause of the injury.— Richmond Traction Co. v. Wilkinson, Va., 43 S. E. Rep. 622.

151. STREET RAILROADS— Frightening Horses.—Street railway company held liable for injuries received by rider of horse, though he was thrown from the horse by its fright, and not knocked off the horse by the car.— Danville Ry. & Electric Co. v. Hodnett, Va., 43 S. E. Rep. 606.

152. TELEGRAPHS AND TELEPHONES—Failure to Deliver Message.—That a telegraph company has no messengers at its office, and its agent is not allowed to leave its office, is no excuse for delay in delivering a message.—Western Union Telegraph Co. v. Parsons, Ky., 72 S. W. Rep. 800.

153. TRIAL—Question for Jury. — It is for the jury to say whether the testimony of a witness that he did not hear signals at the crossing, although he listened, shall be given equal credit with the testimony of a witness, similarly situated, that he heard them. — McLean v. Erie R. Co., N. J., 54 Atl. Rep. 238.

154. TROVER AND CONVERSION — Fixtures. — Where goods are left by the owner in a building lawfully in possession of defendant the owner cannot maintain trover without first making a demand. — Temple Co. v. Penn Mut. Life Ins. Co., N. J., 54 Atl. Rep. 295.

155. TRUSTS— Conveyance to Wife. — Payment of purchase price for land by a husband who directs title to be conveyed to his wife presumed to be a provision for his wife.—Clay v. Clay's Guardian, Ky., 72 S. W. Rep. 810.

156. USURY—Interest.—Where usurious interest is included in a renewal note, the fact that such note bears interest at a legal rate does not purge the transaction of usury. — Citizens' Nat. Bank v. Donnell, Mo., 72 S. W. Rep. 925.

157. VENDOR AND PURCHASER—Record Title.—The record of a deed, neither the grantors or grantees of which appear in the recorded chain of title, is no notice to a subsequent purchaser.—Boynton v. Haggart, U. S. C. C. of App., Eighth Circuit, 120 Fed. Rep. 819.

158. VENDOR AND PURCHASER—Valuable Consideration. —The phrase "purchaser for a valuable consideration," as used in Acts 1885, ch. 147, relative to failure to re-enter deeds, held to mean a fair and reasonable price.—Collins v. Davis, N. Car., 43 S. E. Rep. 579.

159. VENUE—Effect of Stipulation.—Stipulation in contract that action thereunder shall be commenced in a certain county held not to affect jurisdiction, where action is brought in another than the stipulated county. —Benson v. Eastern Building & Loan Assn., N. Y., 66 N. E. Rep. 627.

160. WATERS AND WATER COURSES—Municipal Corporation. — Where a city determined that public welfare was subserved by removing water mains, injunction will not lie at the suit of a private consumer, though removal would render his property practically valueless. — Asher v. Hutchinson Water, Light & Power Co., Kan., 71 Pac. Rep. 813.

161. WILLS—Construction.—Where a father bequeathed the residue of his estate to certain children by name, and thereafter a child was born to him, and there was a provision that the portion of any named child dying under 21 years of age should be divided among the survivors, on the death of one of the children named without issue, the after-born child took no interest in her share. —*In re* Wilcox, N. J., 54 Atl. Rep. 296.

162. WILLS—Election by Widow. — Where a wife elects to take under the law rather than her husband's will, the will, so far as may be, remains effective. — Noecker v. Noecker, Kan., 71 Pac. Rep. 815.

163. WITNESSES —Cross-Examination.—Where a party produces his books of original entry, defendant is entitled to cross-examine him as to entries therein. — Elliott v. Moreland, N. J., 54 Atl. Rep. 224.

164. WITNESSES — Impeachment. — Plaintiffs failing to prove certain facts by their witness held not entitled to prove by third parties that witness had told them he would testify to such facts. — Howe & Johnson v. Skidmore, Ky., 72 S. W. Rep. 792.

165. WITNESSES—Unfriendliness Toward Defendant.— Where a witness testified that she was unfriendly toward defendant, it was not error to sustain an objection to a question whether she did not desire to see defendant convicted.—State v. May, Mo., 72 S. W. Rep. 918.